THE LIBRARY
OF
THE UNIVERSITY
OF CALIFORNIA
LOS ANGELES

SCHOOL OF LAW

William C. Bradley

Digitized by the Internet Archive
in 2008 with funding from
Microsoft Corporation

http://www.archive.org/details/treatiseonprinci00hild

A TREATISE

ON

THE PRINCIPLES OF THE LAW

OF

MARINE INSURANCES.

IN TWO PARTS:

I.—ON THE CONTRACT ITSELF, BETWEEN THE ASSURED AND THE ASSURER.

II.—OF THE CAUSES WHICH VACATE THAT CONTRACT.

2.—IN WHAT CASES THE ASSURED IS ENTITLED TO RECOVER BACK THE CONSIDERATION PAID BY HIM?

3.—AND, LASTLY, WHAT IS THE REMEDY, PROVIDED BY THE LAW, FOR EITHER PARTY AGAINST THE OTHER.

BY FRANCIS HILDYARD, M. A.,
OF THE INNER TEMPLE, ESQ., BARRISTER-AT-LAW.

FROM THE LONDON EDITION.

HARRISBURG, PA.:
PUBLISHED BY I. G. M'KINLEY & J. M. G. LESCURE.
NORTH THIRD STREET.

1847.

T
H 5473 m
1847

HARRISBURG, PA.:
PRINTED ON M'KINLEY AND LESCURE'S
STEAM POWER-PRESSES.

RLK 19 Oct 1953

PREFACE.

I BEG to offer this Treatise to the attention of the Profession, of which I am a Member, as well as to that of Underwriters and Mercantile Men: with an earnest desire, on my part, that, on trial, it may be found capable of supplying the respective wants of both.

FRANCIS HILDYARD.

INNER TEMPLE, *October*, 1845.

Harvard Law Lib. 11/18/52

748857

INTRODUCTION.

"Policy," is the name given to the instrument by which the contract is made between the Assurer and the Assured; and it is not signed by both parties, as in most contracts, but only by the Assurer, who is on that account denominated an underwriter. (*a*)

The present Treatise is confined to Policies of Assurance on the Body of a Ship, &c., and on the Goods and Merchandises laden thereon, and which are therefore called Marine Policies.

This instrument, though not ranking with specialty contracts, not being under seal, has, however, for many centuries, been held by the Courts of Justice of this country, and likewise by the courts of foreign countries, a most sacred agreement between the parties to the instrument.

This "policy" contains the seeds of all the principles of the law of Marine Assurances, which have by the lapse of so many years grown up to such a great height. These principles, which are generally considered to be extremely abstract and difficult in the comprehension of them, which, however, will nevertheless be found as consistent with themselves, as much so, or more certainly, perhaps, than the principles of some more modern laws, are to be gathered, if at all, with certainty from the meanings and constructions which the Courts of Common Law have from very early times placed upon every word, I would say, at any rate upon every sentence of that instrument called a Marine Policy of Assurance. In such a research, the arguments and judgments of some of the most acute and learned Judges, both of early and later times, will form the chief ingredients in the establishment of such a fabric, nor will the opinions of learned writers, both British and foreign, be found insufficient in affording great additional light upon this ancient subject of law.

The legal meanings and constructions which have been put on the words and terms used in this instrument, and acquiesced in through a long series of years, and judicial decisions, will supply the matter, and form the subject of this Treatise. The Treatise consists of two parts. In the first part it has been my endeavour to get the contract of the parties from the words and terms used in the policy, and that would have been sufficient for our purpose, if a clear understanding of the contract of the parties from the words and terms used was all that was required. Unfortunately, however, in the dealings in the world and among mercantile men, especially with respect to this particular contract, which requires more "*bona fides*" than any other, it is not only the real contract that is enough to protect parties entering into this agreement, which is intended for the encouragement and protection of persons who risk not only their profits but their property upon an element the vicissitudes attending which are so well known. Besides the contract they enter into, there are many other considerations to be taken into the account, in order that this system of protec-

(*a*) Park Ins. p. 1, 8th edit.

tion should not be abused. Consequently the subject of the principles of the law of Marine Insurances must include all those questions so well known to the law relative to the voidness or avoidableness of this contract as well as others. I, therefore, briefly mention that, having endeavoured, by going through the policy sentence by sentence, from the beginning to the end, in the first part of this Treatise, to lay down what I believe to be the principles of law strictly applying to the contract itself. In the second part of this Work it was necessary to treat of those topics which have a reference to the question, "Whether or not every thing has been done by the parties who have entered into the contract, to entitle each to the legitimate benefit which each expected to enjoy?" And, if not, it was necessary to point out what legal steps are to be taken by either to enforce their respective rights in the mode laid down by the law.

The following is the common printed form of a Private Underwriter's policy on ship or goods :—(See 35 Geo. 3, c. 63.)

In the name of God, Amen. A. B. as well in his own name, as for and in the name and names of all and every other person or persons to whom the same doth, may, or shall appertain, in part or in all, doth make assurance, and cause himself, and them, and every of them to be insured, lost or not lost, at and from

upon any kind of goods and merchandises, and also upon the body, tackle, apparel, ordnance, munition, artillery, boat, and other furniture, of and in the good ship or vessel called the whereof is master, under God, for this present voyage, E. F., or whosoever else shall go for master in the said ship, or by whatsoever other name or names the same ship, or the master thereof, is or shall be named or called ; beginning the adventure upon the said goods and merchandises from the loading thereof aboard the said ship,

upon the said ship, &c.

and so shall continue and endure, during her abode there, upon the said ship, &c. And farther, until the said ship, with all her ordnance, tackle, apparel, &c., and goods and merchandises whatsoever, shall be arrived at

upon the said ship, &c., until she hath moored at anchor twenty-four hours in good safety ; and upon the goods and merchandises, until the same be there discharged and safely landed. And it shall be lawful for the said ship, &c., in this voyage, to proceed and sail to and touch and stay at any ports and places whatsoever without prejudice to this insurance, the said ship, &c., goods and merchandises, &c., for so much as concerns the assureds by agreement between the assureds and assurers in this policy are and shall be valued at Touching the adventures and perils which we the assurers are contented to bear, and do take upon us in this voyage, they are of the seas, men-of-war, fire, enemies, pirates, rovers, thieves, jettisons, letters of mart and countermart, surprisals, takings at sea, arrests, restraints, and detainments of all kings, princes, and people, of what nation, condition, or quality soever, barratry of the master and mariners, and of all other perils, losses, and misfortunes, that have or shall come to the hurt, detriment, or damage of the said goods and merchandises and ship, &c., or any part thereof. And in any case of any loss or misfortune, it shall be lawful to the assureds, their factors, servants and assigns, to sue, labour, and travel for, in and about the defence, safeguard and recovery of the said goods and merchandise and ship, &c., or any part thereof, without prejudice to this insurance ; to the charges whereof we the assurers will contribute each one according to the rate and quantity of his sum herein assured. And it is agreed by us the insurers, that this writing or policy of assurance shall be of as much force and

effect as the surest writing or policy of insurance heretofore made in *Lombard Street*, or in the *Royal Exchange*, or elsewhere in *London*. And so we the assurers are contented, and do hereby promise and bind ourselves, each one for his own part, our heirs, executors, and goods to the assured, their executors, and administrators, and assigns, for the true performance of the premises, confessing ourselves paid the consideration due unto us for this assurance by the assured at and after the rate of

In Witness whereof we the assurers have subscribed our names and sums assured in *London*.

N. B. Corn, fish, salt, fruit, flour, and seed, are warranted free from average, unless general, or the ship be stranded; sugar, tobacco, hemp, flax, hides and skins, are warranted free from average, under five pounds *per cent.* And all other goods, also the ship and freight, are warranted free of average under three pounds *per cent.* unless general, or the ship be stranded.

CONTENTS.

PART THE FIRST.

SECTION I.

Of the Assured, his Broker, or Agent, - - - - - 1

SECTION II.

Lost or not Lost, - - - - - - - - 10

SECTION III.

"At and From." - - - - - - - - 13

SECTION IV.

Upon any kind of Goods and Merchandises, - - - - 14

SECTION V.

And also upon the Body, Tackle, apparel, &c., of the "Good" Ship called, &c. Whereof —— is Master, &c., - - - 79

SECTION VI.

Beginning the Adventure upon the said Goods, &c., - - - 148

SECTION VII.

It shall be Lawful for the Ship, &c., to Touch and Stay, &c., - 208

SECTION VIII.

"The said Ship, &c., Goods, &c., are valued at ——," - - 263

SECTION IX.

Touching the Adventures, and Perils, &c., - - - - 267

SECTION X.

Perils of the Sea, Fire, &c., - - - - - 270

SECTION XI.

Jettisons, - - - - - - - - - 285

SECTION XII.

Men-of-War, Enemies, Pirates, &c., - - - - 286

SECTION XIII.

Barratry of the Master and Mariners, - - - - 322

SECTION XIV.

All other Perils, Losses, and Misfortunes, that have or shall come, &c., 348

SECTION XV.

Total Losses and Abandonment, - - - - - 354
Average Losses and Adjustment, - - - - - 434

SECTION XVI.

General Average, - - - - - - - 491

SECTION XVII.

The Assurers, Brokers, &c., - - - - - 528

PART THE SECOND.

SECTION I.

Of Fraud in Policies, - - - - - - 570

SECTION II.

Of Illegal Voyages, - - - - - - 630

SECTION III.

Of Non-compliance with Warranties, - - - - 662

SECTION IV.

Of return of Premium, - - - - - - 750

SECTION V.

Of Re-Assurance and Double Assurance, - - - - 772

SECTION VI.

Of The Proceedings in the Action, - - - - - 783

ADDENDA.

(Case of Redmond v. Smith and Another,) - - - - 821

INDEX OF CASES CITED.

Pages referred to are those between brackets, thus [ ]

A.

Page

Abel v. Potts, 433
Acey v. Fernie, 568
Adams v. Sanders, 488
Aguilar v. Rodgers, 755
Airy v. Bland, 547
Albretch v. Sussman, 2
Allen v. Sugrue, 413, 818
Allwood v. Henckell, 431
Alridge v. Bell, 433
Amery v. Rogers, 441, 805
Andrews v. Palsgrave, 797
Anderson v. Royal Exchange, 359, 432, 438
——— v. Wallis, 359, 407, 437
——— v. Pitcher, 697
Andree v. Fletcher, 774
Angerstein v. Bell, 158
Annan v. Woodman, 110
Anon. cor. Chambre, J., York Sum. Assizes, 546
Anthon v. Fisher, 300
Arcangelo v. Thompson, 302, 344
Assievedo v. Cambridge, 26, 292, 295
Atkinson v. Abbott, 600
Atty v. Lindo, 165
Audley v. Duff, 756

B.

Backhouse v. Ripley, 19, 509
Bainbridge v. Neilson, 388
Barber v. Fletcher, 612
Barclay v. Cousins, 40
——— v. Stirling, 218, 237, 426
Baring v. Royal Exchange, 728
——— v. Christie, 713
——— v. Cleggett, 713
——— v. Harkle, 459

Page

Barker v. Blakes, 408, 417, 432
Barlow v. M'Intosh, 648
Barras v. London Assurance, 178
Barrow v. Bell, 459
Barzillay v. Lewis, 713
Bartlett v. Pentland, 560
Bean v. Stupart, 665
Beatson v. Haworth, 240, 242
Bell v. Gilson, 9
—— v. Broomfield, 718
—— v. Carstairs, 718
—— v. Hobson, 194
—— v. Humphries, 9
—— v. Jansen, 4
—— v. Potts, 2, 287
—— v. Reid, 634
Bennet v. Moita, 115
Benson v. Chapman, 394, 439
Bernardi v. Motteux, 712
Berens v. Rucker, 298
Bermon v. Woodbridge, 767
Berthon v. Loughman, 579
Bichoff v. Agar, 312
Bilby v. Lumby, 485
Bird v. Appleton, 635, 725
—— v. Astock, 497
Birkley v. Presgrave, 499, 501, 503, 527
Bishop v. Pentland, 285, 461
Bize v. Dickason, 553
—— v. Fletcher, 608
Blaapot v. Da Costa, 490
Blackett v. Royal Exchange, 83, 449, 475, 513
Blackburne v. Thompson, 646
Blackhurst v. Cockell, 10, 663
Blackenhagen v. London Assurance, 417
Blyth v. Shepherd, 285, 302

	Page
Boehm v. Bell,	54
Bold v. Rotherham,	202
Bond v. Gonzales,	198, 256
—— v. Hunter,	403
—— v. Nutt,	257, 672
Bondrett v. Hentigg,	271
Bolton v. Gladstone,	739
Boulton v. Dobree,	2
Bowring v. Elmsie,	477
Boyd v. Dubois,	133
Brandon v. Nesbitt,	653
Bragg v. Anderson,	242
Brewster v. Kitchell,	656
Brine v. Featherstone,	613
Bristow v. Towers,	653
British Assurance v. Magee,	35
Bromley v. Heseltine,	643
Brooks v. M'Donnell,	442, 490
Broclebank v. Sugrue,	804
Brotherton v. Barber,	392
Brough v. Whitmore,	91, 281
Brown v. Tayleur,	181
—— v. Vigne,	418
Bryans v. Nix,	805
Burnett v. Kensington,	478
Bush v. Bell,	648
Busk v. Royal Exchange,	110, 282
Butler v. Allnutt,	661
—— v. Wildman,	285, 349, 499

C.

Caldwell v. Ball,	805
Callendar v. Oelrichs,	541
Calogan v. London Assurance,	394
Calvert v. Bovill,	741, 743
Cambridge v. Anderton,	366, 412, 438, 813
Camden v. Anderson,	632, 807
—— v. Cowley,	178
Camelo v. Britten,	647, 661
Campbell v. Bordieu,	198, 257
—— v. Innes,	314
—— v. Rickards,	538, 596
Cantillon v. London Assurance,	531
Carter v. Boehm,	96, 586, 629
—— v. Royal Exchange,	261
Carruthers v. Graham,	534
—— v. Sheddon,	17
—— v. Sydebotham,	117, 351, 459
Cary v. King,	811
Case v. Davidson,	426
Casseres v. Bell,	653
Cazalet v. St. Barbe,	402
Chapman v. Fraser,	629
—— v. Walton,	539, 596
Chausand v. Angerstein,	583
Cheminant v. Pearson,	443, 451
Chimney v. Blackburne,	427
Chitty v. Selwyn,	176
Christie v. Lewis,	329
—— v. Secretan,	108
Christian v. Secretan,	717
—— v. Combe,	808
Classon v. Simmard,	240
Clay v. Harrison,	70
Clifford v. Hunter,	110
Cohen v. Hannan,	644
Colby v. Hunter,	667
Cock v. Townson,	244
Cocking v. Fraser,	416, 466, 468, 479
Cochrane v. Fisher,	688
Cocksedge v. Fanshaw,	104
Constable v. Noble,	180
Conway v. Gray,	313, 319
Corlet v. Gordon,	540
Cormack v. Gladstone,	237
Cornfoot v. Fowke,	576
Covington v. Roberts,	503, 514
Courteen v. Touse,	804
Cox v. May,	523
Cowie v. Barber,	636
Craufurd v. Hunter,	32, 34, 56
Crowley v. Cohen,	17, 25
Cruikshank v. Janson,	179
Cullen v. Butler,	276, 348
Cumming v. Forrester,	555
Curling v. Long,	159

D.

Da Costa v. Firth,	22, 387
—— v. Newnham,	433, 517, 523
—— v. Scandret,	577, 627
Dalgleish v. Hodgson,	741
Dalzell v. Mair,	547
Davidson v. Willasey,	169
Davis v. Gildart,	776
Davy v. Milford,	473
Dawson v. Atty,	717
Dean v. Dicker,	291
De'Costa v. Edmunds,	20, 504, 512
De Garey v. Claggett,	702
De'Gamind v. Pigou,	548
D'Eguino v. Bewicke,	703

	Page
De Garron v. Galbraith,	483
De Hahn v. Hartley,	668
Delaney v. Stoddart,	253, 533
Depaiba v. Ludlow,	28
De'Silvale v. Kendal,	74
De'Symonds v. Shedden,	193
Devaux v. J'Anson,	173, 350, 809
——— v. Salvador,	93, 275
——— v. Steele,	53, 67
Dick v. Allen,	441
Dickson v. Lodge,	9, 805
Dixon v. Reid,	326, 379, 408
——— v. Sadler,	115, 116, 124, 334
Dobson v. Bolton,	458
——— v. Wilson,	521
Donaldson v. Thompson,	710
Douglas v. Anderson,	788
——— v. Scougall,	106, 136
——— v. Stewart,	788
Doyle v. Dallas,	407, 409, 439, 787
——— v. Douglas,	787
——— v. Powell,	418
Driscoll v. Bovill,	235
——— v. Pasmore,	613
Dunlop v. Gill,	636
Durrell v. Bedesley,	539
Dyson v. Rowcroft,	469

E.

Early v. Bowman,	800
Earle v. Rowcroft,	331, 341
—— v. Harris,	682
Eden v. Poole,	89
—— v. Parkinson,	96, 123, 705
Edwards v. Footner,	718
Edmunds v. Groves,	798
Edgar v. Bumstead,	551
——— v. Fowler,	552
Elliot v. Wilson,	237
Elton v. Larkins,	579
—— v. Brogden,	249
Elkin v. Janson,	617
Enderby v. Fletcher,	258
Everard v. Hollingworth,	756
Evereth v. Smith,	388
——— v. Bell,	797
Eyre v. Glover,	14

F.

Falkner v. Case,	535
——— v. Ritchie,	379, 388
Farmer v. Legg,	120
Farquharson v. Hunter,	217
Feise v. Aguilar,	644
—— v. Parkinson,	629
Fernandes v. Dacosta,	574
Fisher v. Ogle,	739, 743
Fitzgerald v. Pole,	28, 405
Fitzherbert v. Mather,	614, 621
Fisk v. Masterman,	757
Fillis v. Brutton,	583
Fletcher v. Poole,	89, 93
Flindt v. Waters,	2
Flinn v. Headlam,	602
Flint v. Flemyng,	171, 175
—— v. Mesurier,	40
Flower v. Young,	806
Foley v. Moline,	579
Forbes v. Aspinall,	161, 168, 174
——— v. Cowie,	166
——— v. Wilson,	109
Forshaw v. Chabert,	110
Fort v. Lee,	579
Forster v. Christie,	249, 417
Foster v. Steele,	106
Fox v. Black,	235
Foy v. Bell,	547
Fowke v. Pinsake,	546
Fragano v. Long,	69
France v. Kirwan,	697
Freeman v. Taylor,	260
——— v. East India Company,	379
Freeland v. Walker,	652
French v. Backhouse,	9
Friese v. Woodhouse,	579
Furneaux v. Bradley,	404
Furtado v. Rogers,	2, 287, 655, 760

G.

Gale v. Machell,	771
Gairdner v. Senhouse,	241
Gamba v. Mesurier,	659
Gammon v. Beverly,	486
Gardiner v. Coleman,	781
——— v. Salvador,	409
Garrels v. Kensington,	745
Gernon v. Royal Exchange,	433
Geyer v. Aguilar,	716
Gibson v. Hunter,	104
——— v. Mair,	662
——— v. Service,	662
——— v. Winter,	567
Gill v. Dunlop,	636
Gist v. Mason,	642
Gladstone v. Clay,	194

Page

Gladstone v. King, 620
Glennie v. Royal Exchange, 359, 437
——— v. Edmunds, 554
Glover v. Black, 15
——— v. Cowie, 298
Goddart v. Garret, 29
Godling v. London Assurance, 776
Godsall, v. Boldero, 392
Goldschmidt v. Lyon, 553
Goldsmith v. Whitmore, 339
Gordon v. Morley, 198, 257
——— v. Rimington, 269, 282
——— v. Vaughan, 647
Goss v. Withers, 27, 287, 303, 305, 361, 368, 385
Gould v. Oliver, 20, 504, 509, 512, 798
Graham v. Barras, 109, 110, 150, 667, 689
——— v. Russel, 554
Grant v. Delacour, 209
—— v. Parkinson, 38, 43, 53
—— v. Paxton, 209
Green v. Brown, 351
——— v. Elmslie, 270
——— v. Royal Exchange, 429
——— v. Young, 262, 308, 313
Gregory v. Christie, 18
Gregson v. Gilbert, 272, 809
Grove v. Dubois, 552
Guibert v. Readshaw, 251
Groning v. Crockett, 652

H.

Haddow v. Parry, 805
Hadkinson v. Robertson, 413
Hagedorn v. Bell, 646
——— v. Oliverson, 62
——— v. Reid, 644
——— v. Whitmore, 474
Hahn v. Corbet, 271
Hall v. Molineux, 81
Hamilton v. Mendez, 361, 379, 389, 391
Hammond v. Reid, 218
Harding v. Carter, 529
Hare v. Travis, 262
Harford v. Maynard, 304
Harman v. Kingston, 38, 263
——— v. Vaux, 459
Harratt v. Wise, 315
Haughton v. Ewbank, 804
Harrington v. Halkeld, 252

Page

Harrington v. Macmorris, 798
Harrison v. Douglass, 663, 799
Harris v. Watson, 503
Hartley v. Buggin, 229, 259
Hastelow v. Jackson, 762
Havelock v. Lockwood, 301
——— v. Rockwood, 712
Haywood v. Rogers, 134
Hearne v. Edmunds, 460
Hedburg v. Pearson, 473
Henchman v. Offley, 82
Henkle v. Royal Exchange, 641, 784
Henrickson v. Margetson, } 43
——— v. Walker, }
Henry v. Staniforth, 760
Hesselton v. Allnutt, 262
Heyman v. Parish, 285, 344
Hewitt v. Flexney, 482
Hibbert v. Champion, 485
——— v. Halliday, 247
——— v. Martin, 110
——— v. Pigou, 693
Hill v. Secretan, 68
Hills v. London Assurance, 475
Hodgson v. Blackiston, 432
——— v. Glover, 47
——— v. Malcomb, 270
——— v. Richardson, 191, 576, 581
Hoffman v. Marshall, 480
Hogg v. Goulney, 481
—— v. Horner, 241, 764
Hollingworth v. Brodrick, 127
——— v. Broderick, 788
Hooper v. Lusby, 9
Horncastle v. Suart, 164
Hoskins v. Pickersgill, 88
Hore v. Whitmore, 670
Housten v. Robertson, 556
Horneyer v. Lushington, 158, 192, 718
Hubbard v. Glover, 613
Hucks v. Thornton, 110, 364
Hudson v. Harrison, 433
Hughes v. Cornelius, 66, 711
Hull v. Cooper, 176, 613
Hunt v. Royal Exchange, 358, 408, 433, 437
Hunter v. Leathley, 221, 237, 536
——— v. Parker, 379, 807
——— v. Potts, 277
——— v. Wright, 764
Hurry v. Royal Exchange, 152, 454

I.

Page

Idle v. Royal Exchange, 430
Inglis v. Vaux, 219
Irving v. Richardson, 455

J.

Jacob v. Jansen, 636
Jarrat v. Ward, 247
Jeffereys v. Legendra, 270
Jenkins v. Mackensie, 404
Jolly v. Walker, 244
Jones v. Schmoll, 269
—— v. Pearce, 789
Johnson v. Shippen, 377
——— v. Sheddon, 452
Johnston v. Sutton, 631

K.

Kellner v. Le Mesurier, 658
Kelly v. Walton, 433
Kensington v. Inglis, 648
Kent v. Bird, 49
Kenyon v. Berthon, 667
Kewley v. Ryan, 82
Kill v. Hollester, 784
Kindersley Appellants v. Chase Respondents, 729
King v. Glover, 24, 47
Kingham v. Robins. 796
Kingsford v. Marshall, 464
Kingston v. Knobbs, 207, 685
Knight v. Cambridge, 322, 334
Knox v. Wood, 48
Koster v. Reid, 352
——— v. Eason, 555
Kruger v. Wilcox, 781
Kulen Kemp v. Vine, 76, 809

L.

Lambert v. Liddard, 242
Lang v. Anderdon, 684
Langhorne v. Allnutt, 218, 259
———— v. Hardy, 193
Laroche v. Oswin, 237
Lateward v. Curling, 516, 517
Levabre v. Walter, } 225
——— v. Wilson, }
Law v. Hollingsworth, 115
Lawrence v. Aberdein, 276
———— v. Sybotham, 245, 258
Leatham v. Terry, 423

Page

Lee v. Beach, 105, 136
Le Cheminant v. Pearson, 442
Lecras v. Hughes, 18, 51, 440
Leigh v. Mather, 178
Lemecke v. Vaughan, 81
Le Mesurier v. Vaughan, 646
Le Pypre v. Farr, 29
Lethulier's Case, 197
Lever v. Fletcher, 639
Lewen v. Swasso, 336, 342, 784
Lewis v. Rucker, 37, 263, 440
——— v. Cormac, 652
Lilly v. Ewer, 698
Livie v. Janson, 271, 443, 449
Long v. Allen, 771
—— v. Douglas, 788
Lockyer v. Offley, 153, 328
Loraine v. Thomlinson, 765
Lothian v. Henderson, 664, 738
Lowry v. Bourdieu, 72, 761
Lubbock v. Potts, 298, 659, 764
———— v. Rowcroft, 417
Lucena v. Craufurd, 7, 25, 52, 66
Lucey v. Ingram, 115
Lundie v. Robertson, 800
Lynch v. Hamilton, 580
——— v. Dunsford, 580

M.

Maanss v. Henderson, 535
Mann v. Forrester, 535
Mallony v. Barber, 538
Macdougal v. Royal Exchange, 458
Macdowall v. Fraser, 610
Macarthy v. Abel. 391, 424
M'Andrews v. Bell, 583
———— v. Vaughan, 416, 471
Mackenzie v. Shedden, 164
———— v. Duff, 763
Maeburn v. Leckie, 379
Manning v. Newnham, 406
———— v. Irving, 813
Mansfield v. Maitland, 74
March, Earl of v. Pigot, 123
Marsden v. Reid, 242, 606
Marsh v. Robinson, 807
Martin v. Crockat, 433
——— v. Sitwell, 751
Mason v. Scurray, 465, 472
——— v. Simeon, 547
M'Andrew v. Bell, 804
Mathie v. Potts, 152, 302
M'Intosh v. Marshall, 584

	Page
M'Intosh v. Slade,	115
M'Iver v. Henderson,	388
M'Masters v. Shoolbred,	405
May v. Christie,	487
Mellish v. Allnutt,	193, 797
——— v. Andrews,	221, 243, 365, 412
Meager v. Smith,	800
Mead v. Davison,	11, 572
Meretony v. Dunlop,	154
Metcalf v. Parry,	243
Meyer v. Gregson,	770
Meyne v. Walter,	601
Middlewood v. Blakes,	262
Mills v. Roebuck,	97
Milles v. Fletcher,	113, 374, 401, 403
Milward v. Hibbert,	505
Minett v. Anderson,	157
——— v. Forrester,	553
Mitchell v. Edie,	367
Moir v. Royal Exchange,	683
Moody v. Surridge,	465
Moore v. Taylor,	219
Montgomery v. Richardson,	798
——————— v. Eggington,	159, 160
Mork v. Abel,	763
Morrison v. Parsons,	427
Moss v. Byrom,	247, 330
Motteux v. London Assurance,	199, 250, 784
Mount v. Harrison,	430
——— v. Larkins,	177, 229, 260
Mouse's Case,	497
Muller v. Hartshorne,	797
Mullett v. Sheddon,	365, 412
Munro v. Vandam,	106, 136
Murdock v. Potts,	248
Murphy v. Bell,	39
Myer v. Vande Deyl,	509

N.

	Page
Naylor v. Taylor,	317, 393
Neale v. Reid,	69
——— v. Erving,	803
Nelson v. Salvador,	683
Nesbitt v. Lushington,	303, 305, 475
Newby v. Read,	352
——— v. Reed,	775
Newcastle Insurance Company v. Macmorrow,	663
Noble v. Kennoway,	151, 203
Nonneu v. Kettlewell,	193
Nutt v. Bourdieu,	336, 340

O.

	Page
Oddy v. Bovill,	712
Ogle v. Wrangham,	9
Ohrly v. Dunbar,	788
Oliver v. Cowley,	107
Oom v. Bruce,	759
Oswell v. Vigne,	718
Ougier v. Jennings,	205, 229

P.

	Page
Page v. Thompson,	313
Palmer v. Blackburne,	456
——— v. Marshall,	8
——— v. Pratt,	18, 79
Parfitt v. Thompson,	111
Park v. Hammond,	538
—— v. Hebson,	170
Parker v. Beasley,	555
——— v. Carter,	535
——— v. Potts,	106
——— v. Smith,	554
Parkin v. Tunno,	417
——— v. Dick,	661
Parkinson v. Collier,	260
Parmeter v. Todhunter,	432, 433
Parr v. Anderson,	245
Parry v. Aberdein,	402
Parsons v. Scott,	388
Patrick v. Eames,	161
Paterson v. Powell,	762
Patterson v. Ritchie,	392
Pawson v. Watson,	602, 664
——— v. Barnevelt,	667
Pelly v. Royal Exchange,	85, 137, 197
Peters v. Milligan,	525
Phillips v. Barber,	277, 351
——— v. Headlam,	117, 118
Phillipps v. Irving,	177, 226, 260
Phyn v. Royal Exchange,	331
Pipon v. Cope,	132
Piescall v. Allnutt,	661
Pirie v. Anderson,	806
—— v. Steele,	518
Pittigrew v. Pringle,	686
Planche v. Fletcher,	597, 638
Plantamour v. Staples,	146, 148
Plummer v. Wildman,	518
Poingdestre v. Royal Exchange,	517
Polhill v. Walter,	572
Pollard v. Bell,	719, 737
Pond v. King,	28
Potts v. Bell,	644
Power v. Butcher,	549

Page
Power v. Whitmore, 519
Powles v. Innes, 8, 36
Price v. Bell, 727
—— v. Noble, 519
Proctor v. Thorbourne, 111
Puller v. Glover, 74

R.

Racker v. Hollingbury, 627
Raine v. Bell, 236
Ranken v. Reeve, 241
Ratcliffe v. Shoolbred, 581
Rawlinson v. Jansen, 647
Rayner v. Godmond, 460
Read v. Bonham, 433, 818
Redman v. Wilson, 271
Reid v. Darby, 806
—— v. Derby, 377
Reyner v. Hall, 486
Rich v. Parker, 716
Richardson v. Anderson, 481
———— v. London Ass. 226
———— v. Nourse, 525
Rickards v. Murdock, 539, 583, 596
Rickman v. Carstairs, 195
Ridsdale v. Newnham, 110, 684
Ritchie v. Bousfield, 115
Roebuck v. Hamerton, 762
Roberts v. Fonnerau, 573
Robertson v. Carruthers, 379
———— v. Clarke, 379, 413
———— v. Ewer, 90, 309
———— v. Hamilton, 71
———— v. Majoribanks, 610
———— v. French, 805
Robinson v. Gleadow, 9
———— v. Morris, 648
Rogers v. Maylor, 482
——— v. Davis, 775
Rohl v. Parr, 276
Roscow v. Corson, 327
Ross v. Hunter, 330
—— v. Thwaites, 509
Rotch v. Edie, 310
Routh v. Thompson, 57. 62, 761
Roux v. Salvador, 149, 353, 355, 431, 457
Royal Exchange v. Idle, 379
Rucker v. Allnutt, 259
——— v. Palsgrave, 797
Russel v. Bangley, 534, 557, 558
—— v. Boheme, 809
Rutledge v. Burrel, 667

S.

Page
Salisbury v. Townson, 258
Salonicci v. Johnson, 307, 707, 745
———— v. Woodmas, 715
Salvador v. Hopkins, 212, 214
Samuel v. Royal Exchange, 113, 158
Saville v. Campion, 330
Schroeder v. Vaux, 652
Scott v. Bourdillon, 465
—— v. Irving, 557, 561
—— v. Thompson, 249
Sea Ins. Comp. of Scotland v. Gavin, 181
Senat v. Porter, 808
Sewel v. Royal Exchange, 303, 635
Seamen v. Fonnerau, 578
Seller v. Work, 538
Sharp v. Gladstone, 426
Shaw v. Felton, 156
Shee v. Clarkson, 553
Sheppard v. Chewter, 486
———— v. Wright, 501
Sheriff v. Potts, 236
Shipton v. Thornton, 114, 137, 141, 144, 148
Shirley v. Wilkinson, 612, 621
Shoolbred v. Nutt, 133
Sibbald v. Hill, 575
Siffken v. Allnutt, 646, 764
——— v. Lee, 719
Simeon v. Bazett, 314
Simonds v. Hodgson, 16
Simond v. Boydell, 752
——— and Loder v. White, 527
Smith v. Lascelles, 72, 536
——— v. Plummer, 24
——— v. Robertson, 392
——— v. Scott, 274
——— v. Surridge, 110, 176, 235
——— v. Calogan, 538
——— v. Readshaw, 702
Smout v. Ilbery, 572
Soares v. Thornton, 329
Solly v. Whitmore, 259
Sparkes v. Marshall, 70
Sparrow v. Carruthers, 151
Spencer v. France, 27
Spitta v. Woodman, 193
Splidt v. Bowles, 427
Stapleton v. Nowell, 796
Stamma v. Brown, 322
Steele v. Lacy, 718
Stewart v. Aberdeen, 558, 564
——— v. Bell, 152

	Page
Stewart v. Dunlop,	613
——— v. Wilson,	111
Stevenson v. Snow,	759
Stirling v. Vaughan,	8, 63
Stitt v. Wardell,	236
Stockdale v. Dunlop,	49
Strong v. Natally,	152
Suart v. Powell,	121
Sutherland v. Pratt,	12, 33, 149
Sutton v. Buck,	806
Ship, The "Acteon,"	647
——— "Adelaide,"	315
——— "Betsy,"	710
——— "Beaver,"	258
——— "Christopher,"	709
——— "Copenhagen,"	517
——— "Lady Durham,"	24
——— "Emanuel,"	643
——— "Flad Oyen,"	707
——— "Fanny and Elmira,"	379
——— "Good Hope,"	652
——— "Gratitudine,"	377, 521
——— "Jane,"	258
——— "Jonge Tobias,"	643
——— "Louise Charlotte de Guldeneroni,"	648
——— "Maria,"	747
——— "Matchless,"	634
——— "Mercurius,"	643
——— "Mills Frigate,"	96
——— "Neptunus,"	315
——— "Protector,"	115
——— "Ringende Jacob,"	643
——— "Sarah Christina,"	643
——— "Waterloo,"	258
——— "Woodrop Sims,"	274

T.

Tabbs v. Bendleback,	705
Tait v. Levy,	110
Tanner v. Bennett,	409
Tasker v. Scott,	76
——— v. Cunningham,	232
——— v. Wilmer,	261
Tate v. Meek,	330
Tatham v. Hodgson,	276
Taylor v. Curtis,	502
——— v. Wilson,	248
——— v. Woodness,	701
Teed v. Martin,	807
Thelluson v. Bewick,	441
——— v. Fletcher,	32, 266, 434
——— v. Sheddon,	811
Thelluson v. Staples,	681
Thellusson v. Fergusson,	675, 677
Thomas v. Foyle,	805
Thompson v. Charnock,	784
——— v. Royal Exchange,	359, 437
——— v. Rowcroft,	420
——— v. Taylor,	163
——— v. Whitmore,	459
Tiernay v. Ethrington,	200
Todd v. Ritchie,	339
——— v. Reid,	560
Tongue v. Watts,	160
Toulmin v. Anderson,	344, 635
Touteng v. Hubbard,	312
Townson v. Guyon,	235
Truscott v. Christie,	170
Tunno v. Edwards,	44, 490
Turpin v. Bilton,	543
Tyler v. Horne,	628
Tyrie v. Fletcher,	757
Tyson v. Gurney,	300, 707

U.

Usher v. Noble,	454
Uspariclia v. Noble,	319

V.

Vallance v. Dewar,	206, 594
Vallejo v. Wheeler,	231, 322, 330, 334, 339
Vandyck v. Hewitt,	763
——— v. Whitmore,	646
Vanharthals v. Halhead,	646
Violett v. Allnutt,	218, 237
Verdon v. Wilmot,	696
Vezian v. Grant,	671
Victoria v. Cleeve,	700
Visgar v. Prescott,	313

W.

Wake v. Atty,	617
Walker v. Maitland,	110, 284
Wales v. Eames,	157
Wallace v. Telfair,	537
Warre v. Miller,	170, 179, 259
Warwick v. Scott,	197
Wharton v. De la Rive,	762
Watson v. Clarke,	106, 123
Watt v. Morris,	106
Way v. Modigliani,	231

	Page
Webb v. Thomson,	696
Webster v. Forster,	579
Wederburn v. Bell,	121, 752
Weir v. Aberdein,	127, 251
Wells v. Williams,	320
——— v. Hopwood,	462
Weston v. Eames,	610
Westbury v. Aberdein,	579
Whitehead v. Vaughan,	535
Whittingham v. Thornborough,	626
Wilkie v. Geddes,	107
Wilkinson v. Coverdale,	537
Williams v. East India Company,	625
——— v. London Assurance,	523
——— v. Shee,	218, 259
——— v. Marshall,	693
Williamson v. Innes,	170
Wilson v. Ducket,	627
Wilson v. Foster,	405
——— v. Marryat,	633
——— v. Millar,	379, 521
——— v. Royal Exchange,	24, 407
——— v. Smith,	465, 493
Winter v. Haldimand,	77
Wolfe v. Claggen,	255
Wolff v. Horncastle,	4, 17, 71, 319
Woodward v. Larkins,	808
Woolmer v. Muilman,	573, 704
Woolridge v. Boydell,	231
Wright v. Barnard,	808
——— v. Shiffner,	677

Y.

Young v. Irving,	266
——— v. Turing,	397, 818

THE PRINCIPLES

OF

THE LAW

OF

MARINE INSURANCES.

PART I.

SECTION THE FIRST.

THE ASSURED.

A. B. "as well in own name as for and in the name and names of all and every other person or persons to whom the same doth, may, or shall appertain, in part or in all, doth make assurance, and cause and them, and every of them to be insured." The policy, it will be seen, in the commencement of the first sentence above cited, sets out by declaring on the *face* of the policy either the name of the assured himself, or the name and firm of the broker or agent employed by him to make the insurance, and the name or names of all and every other person or persons to whom the same doth, may, or shall appertain, in part or in all, doth make assurance and cause and them, and every of them to be insured. And the *first* question that is necessary to be inquired into is this, "What persons are by the law of this country considered as capable to represent the character of the assured in a marine policy of assurance?" To this question the answer is, that all persons whatsoever of sane memory, wherever domiciled, are permitted by law to be *the [*2] assured, with one single exception, and this is, in respect of the disability of alien enemies. This rule of law (which is not confined to this contract, but extends equally to all known to the law) is founded upon grounds of public policy, and it amounts, in fact, to saying that *no contract between a British subject and an enemy is valid by the common law*, and such a contract is as much prohibited as if it had been expressly forbidden by act of Parliament; and a contract of this description is incapable of being enforced in a Court of Justice, either of law (*a*) or of equity, (*b*) unless the alien enemy

---

(*a*) Bell v. Potts, 8 T. R. 548. Furtado v. Rogers, 3 B. & P. 191. And see *post*, in this treatise, part 2, sec. 2.

(*b*) Albretch v. Sussman, 2 Ves. & B. 323.

come into this country and reside, with the license of the Lord the King. *Boulton and another* v. *Dobree.* (*c*) It is to be observed, however, that the right of action is only suspended until the return of peace, if the contract were legal, and made before the commencement of the war. And it has therefore been decided, in a case of *Flindt* v. *Waters*, (*d*) that a British agent who had made a policy of insurance on behalf of alien enemies, who became enemies after the loss happened, but before the commencement of the action, was entitled to recover against an underwriter, who had only pleaded the general issue; for such temporary suspension, during the war, of the assured's right to sue upon a contract, legal at the time, and liable to be enforced upon the return of peace, cannot be taken advantage of under a plea of perpetual bar, there being no legal disability in the plaintiff on the record to sue. Lord *Ellenborough* says, "The defence of an alien enemy must be accommodated to the nature of the transaction out of which it arises; it may go to the contract itself on which the plaintiff sues, and operate as a perpetual bar; as the objection may, as in a case of this sort, be merely personal in respect to the capacity of the party to sue upon it. Here the objection is taken upon the general issue, which is a plea of perpetual bar, and if found against the plaintiff [*3] *would have concluded him for ever: so that should peace be established to-morrow between the two countries, and the Crown should not have interfered to seize the debt, yet on this plea of bar the plaintiff would have been for ever estopped to sue for his debt. But here the objection is only of a temporary nature: the contract itself was perfect *at the time* it was made; the trade was made with an alien friend; the insurance, the loss and cause of action, had arisen before the assured had become enemies. When, therefore, they became such it was only a temporary suspension of their own right to sue in the Courts here as alien enemies; but that objection cannot be carried further, nor be applied to the plaintiff as their trustee, who is a subject of the king; otherwise, if it could avail upon this plea, it would be making that a perpetual, which is in its nature only a temporary bar."

Secondly, under this head it is necessary to refer to the statute 28 Geo. 3, c. 56, which after repealing a former statute, 25 Geo. 3, c. 44, the provisions of which were thought too rigid, enacts, "That it shall not be lawful after the passing of this act for any person or persons to make, or cause to be made, any policy of assurance on any ship, or vessel, or upon any goods, merchandises, effects, or other property whatsoever, without first inserting, or causing to be inserted, the name or names, or the usual style and firm of dealing of one or more of the *persons interested* in such assurance; or without, instead thereof, first inserting the name or names of the usual style and firm of dealing of the *consignor* or *consignors*, *consignee* or *consignees* of the goods or property so to be insured; or the name or names or the usual style and firm of dealing of the person or persons residing in Great Britain *who shall receive the order for*, and make such policy, or of the person or persons who shall *give the order or directions* to the agent or agents immediately employed to negotiate or make such policy." The statute further declares, "that every policy made or underwrote contrary to the true intent and meaning of this act shall be null and void to all intents and purposes."

*On this statute it has been decided that although it be not neces- [*4] sary to specify in the declaration what character the person making the insurance bears, namely—whether consignor or consignee, &c.; yet having averred in the declaration, that they answered a particular description men-

(*c*) 2 Camp. 162. See the subject of insuring the *property of an enemy*, treated of in Park Ins. 8th edit. p. 522. (*d*) 15 East, 260.

tioned in the statute, they were bound to prove it. *Bell* v. *Janson*. (*a*) As this statute 28 Geo. 3, recites in the preamble, "that it had been found by experience that great mischiefs and inconveniences had arisen to persons interested in ships, and to persons using commerce, from the acts of 25 Geo. 3, c. 44, and that it was expedient that other and more convenient rules should be made for the regulating insurances on ships, &c., than those contained in the said statute," the Court of Common Pleas, in the case of *Wolff and others* v. *Horncastle*, (*b*) considered themselves bound to put the most liberal construction on the statute that the words would bear. This case was an action on a policy of assurance brought by the plaintiffs, by their names and firm of Messrs. Wolffs and Dorville, "as well in their own names as for and in the name and names of all and every other person or persons to whom the same did, might, or should appertain in part or in all." The defendant underwrote the policy for 200*l.*: there was a total loss. "The first count of the declaration, averred that the insurance was made by the plaintiffs, as the agents of one Jockum Brink Lund, and for his use and benefit; and the plaintiffs, at the time of the making thereof, were persons residing in Great Britain, and did make the policy as such agents, and the style and firm of "Messrs. Wolffs and Dorville," inserted in the policy, was at the time of the making thereof, the usual style and firm of the firm of them the plaintiffs, and that Jockum Brink Lund was then interested in the goods to the amount insured. The verdict was found for the plaintiffs, subject to the opinion of the Court on a case. *Buller*, J.—"It was a real *bonâ fide* transaction, a loss has happened, and the underwriter now chooses to say, that for *want of a strict compliance with the statute 28 Geo. 3, he shall be excused from paying the money. If, [*5] however, the defendant can bring his case within the statute, he has the right to do so. But has the defendant brought his case within the meaning of the statute? Has he even brought it within the words of the statute? And even if he brought it within the words and not within the meaning, I should be clearly of opinion for deciding against him; and, in so doing, I should follow the directions of the statute, which in the last clause enacts, 'that every policy or policies of insurance made and wrote contrary to the *true intent* and *meaning of this act*, shall be null and void." Let us see, then, whether the plaintiffs do, or do not, come within any of the descriptions of persons in the last statute. These descriptions are *four*—(1) the *consignor;* (2) the *consignee;* (3) the *person receiving;* (4) the *person giving the order.* It is clear that the plaintiffs are not the *consignors:* but I am not so sure that they are not the *consignees.* It is true that the goods were originally consigned to another person, but the case must be considered as it stood at different times: though the Cudbear Company were the *consignees* at first, it does not follow that they continued to be so.

What is a *consignee?* A person residing at the port of delivery, to whom the goods are to be delivered when they arrive there. Lund does not trust the Cudbear Company without securing himself: he therefore sends the bill of lading to the plaintiffs, who are his general agents, in order that he may be secure of being paid for his goods. If the Cudbear Company had received the goods, they would have been the *consignees*, but they refused to receive them: then who was entitled to receive them? to whom could the right belong but to the persons who had the bill of lading, and who were the general agents of the consignor. From the moment the Cudbear Company refused to have any thing to do with the goods, the plaintiffs became the *consignees.* If this be so there is no objection to the policy, and I am satisfied I do not carry this

(*a*) 1 M. & S. 201. (*b*) 1 B. & P. 316.

[*6] construction too far, when the justice of the case is *with the plaintiffs. But there are *two other characters* mentioned in the act. The *next* is the *person who receives the order* to insure; let us see whether these plaintiffs had not *an order* to make insurance. The goods were originally intended for the Cudbear Company, but they were sent accompanied with a letter, which stated in the clearest terms, that Lund intended that they should be insured. The Cudbear Company having refused to take the goods, could the plaintiffs, who were the general agents of Lund, could any man of sense read his letter and doubt of his intentions? In giving his reasons, he says, that the season is so far advanced, he does not think it safe to send the goods without their being insured. The plaintiffs must have been blind if they had not seen it was his intention to have them insured. Then what was his intention? Why that they should be insured. It is agreed that a *general agent* has a right to exercise his discretion for the benefit of his principal: he must act on the spur of the occasion, and if nothing had passed, I have doubts whether the consignor would not have been liable to pay the premium. But the plaintiffs inform the consignor of their having made the insurance, and he highly approves their acts, which brings the case within the maxim that 'omnis ratihabitio retrotrahitur mandato priori æquiparatur.' I am clear therefore, that the plaintiffs were the persons who *received the order* to *make this insurance* within the description of the act of Parliament. But there is still *another character* to be considered; the statute mentions in the last place, the person who *gives the order* to *make the insurance*. Now in my opinion, it is impossible to state a case that comes more directly within the act of Parliament than this. Who were the persons immediately concerned, who immediately employed the broker, who gave the immediate order for insurance, but the plaintiffs? It appearing therefore that they come within the words of the act of Parliament, the case stands clear of all objections, and is in law, conscience, and justice with the plaintiffs." The other Judges, *Heath*, J., *Rooke*, J., concurred. Postea to the plaintiffs.

[*7] *In the case of *Lucena* v. *Craufurd*, (*a*) in error in the House of Lords, from the Court of King's Bench, the action was on a policy of assurance, and the first count averred that the king, by virtue of the powers vested in him by 35 Geo. 3, c. 80, had issued his commission, under the Great Seal, directed to certain commissioners, naming them and nominating them commissioners for the purposes mentioned in that act, and authorizing them to take into their possession ships and goods belonging to subjects of the *United Provinces*, which *had been* or *might be* detained *in* or brought *into* the ports of this kingdom, and to manage, sell, and dispose of the same to the best advantage, according to such instruction as they should receive from the king in council. Before any declaration of war against the *United Provinces*, one of his Majesty's ships took several *Dutch* East Indiamen, and carried them into *St. Helena;* the commissioners, with the consent of the Lords of the Treasury, insured them "at and from *St. Helena* to *London.*" War was soon after declared against the *United Provinces*, and the ships were finally condemned as prize to his Majesty, "as having belonged, when taken, to the subjects of the *United Provinces*, since become enemies." Upon a loss happening, the commissioners declared on the policy, and averred the interest to be in the king. The verdict was found for the plaintiffs below, and the Lords, on the writ of error, decided that the action *well* lay.

At the trial the Lord Chief Justice *Ellenborough* directed the jury that, upon the evidence, the plaintiffs might maintain the issue as to the second count, and

---

(*a*) 1 Taunt. 325.

that his Majesty, at the times when the ships and goods sailed from St. Helena, and when the policy of insurance was made, and from thence until, &c., at the time of the loss of the *Houghley* and *Surcheance*, had an insurable interest in the said ships and goods; and further, that if any of his Majesty's subjects make an insurance for the *benefit* and on *account of* his Majesty, his Majesty may *adopt* and *ratify* the same; and that the insurance *in the second count was adopted by his Majesty. And the jury found [*8] their verdict for the plaintiffs as to the second count, with £800 damages. The same doctrine was laid down in the case of *Stirling* v. *Vaughan*. (*a*)

In a very recent case in the Court of Exchequer, of *Powles and others* v. *Innes*, (*b*) a question was discussed and settled by the Court (consisting of Lord *Abinger*, C. B., *Parke*, B., and *Gurney*, B.,) whether an assured, who assigns away his interest in a ship or goods, after making a policy of insurance upon them, could sue upon the policy; and it was held by the Court that he could sue only in *one* way, viz: as a trustee for the assignee, in a case where the policy is *handed over to him*, upon the *assignment*. Lord *Abinger* says:—"The contract of insurance was *originally* only a contract of *wager;* since the Legislature has adopted it, it is a contract of *indemnity only*, and nobody can recover who is not *really interested*. The policy is but a 'chose in action,' and cannot pass merely by the assignment of the ship." And *Parke*, B., says: "If the policy had been handed over with the bill of sale, or there had been an order to the brokers to hand it over, the case would be different—then the parties might sue as *trustees* for the purchaser; but we cannot infer that, no facts being stated in the case to warrant such an inference." (*c*)

In the case of *Palmer* v. *Marshall*, (*d*) where it was alleged in the declaration that the plaintiff, by M'Ghie and Page (his agents in that behalf,) caused to be made a certain policy of insurance, it was held by the Court of Common Pleas that it was necessary for the plaintiff to prove that M'Ghie and Page were his agents. Upon this act it has also been held that it is not necessary, where a policy is made by an agent, to add the word *agent*, or any other description, to his name in the policy itself; (*e*) and it has also been decided that a *policy made by a *broker*, describing himself therein as *agent*, has [*9] sufficiently complied with the requisition of the statute. It is to be presumed, after verdict, that the plaintiff fell within one or other of the descriptions in the act. (*a*) And Lord *Ellenborough* held at *Nisi Prius*, that an allegation, both in the policy and the declaration, that the policy was made for the plaintiffs by the firm A. B. C., was satisfied by proof that it was made by the firm A. & B., there being two firms having two members in common, *Dickson* v. *Lodge*. (*b*)

Before the passing both of 25 Geo. 3, and 28 Geo. 3, it was decided that the husband of a ship had no right to insure for any part-owner, without his particular direction, nor for all the owners in general, without their general direction, or something equivalent to it, *French* v. *Backhouse*. (*c*)

But it has recently been held in the case of *Robinson and another, Assignee, &c.*, v. *Gleadow and others*, (*d*) that where one of several part-owners of a

---

(*a*) 11 East, 623, *post*. (*b*) 11 M. & W. 10.
(*c*) See Sutherland v. Pratt, 12 M. & W. 16, and *post*, sec. iv.
(*d*) 8 Bing. 82.
(*e*) De Vignier v. Swanson, B. R. Mich. 39 Geo. 3, Park Ins. 17.
(*a*) Bell v. Gilson, 1 B. & P. 345. Mellish v. Bell, 15 East, 4.
(*b*) 1 Stark. 226.
(*c*) 5 Burr. 2727. Bell v. Humphries, 2 Stark. 345. Ogle v. Wrangham, coram Kenyon, sit. Guild. H. T. 1790, Abbott on Ship, p. 92, 6th edit.
(*d*) 2 Scott, 250; 2 B. N. C. 156.

ship, and who was the managing owner, without any express authority from the others, effected a joint insurance upon the entire ship, charging the premium and commission in the ship's accounts, which were open to the inspection of, and were actually inspected by, the other owners, and not objected to, the jury were warranted in finding that the managing owner had a joint authority to make an insurance for the whole; and that all the owners were liable to the amount of the premium and commission, notwithstanding the credit was, in the first instance, given to the managing owner alone, it appearing that the broker was ignorant of the name of the other owners. And if part-owners of a ship, be in partnership *generally*, an order to insure given by *one*, renders *all liable*, *Hooper* v. *Lusby*. (*e*)

This first section, which is now concluded, treats solely of the first sentence [*10] in the policy, which was taken as the head *of this section, and, which the reader will observe, called upon me, according to the plan I have proposed, merely to state briefly the persons capable of being the assured in the policy of insurance, and what rules have, by Legislative enactments, been laid down to restrict such parties who legally can sue on the policy to those persons alone who answer the several descriptions mentioned in the act of Parliament, in every case of a contract of insurance made by the assured, or his agents, with the assurers. Let us now proceed to the *next immediate* words of the policy.

SECTION II.

"LOST OR NOT LOST."

These words "lost or not lost," which follow the word "insured" in the policy, are words of the greatest importance in this contract; and they are peculiar to English policies, and are not inserted in the policies of foreign countries. (*a*) They are certainly very hazardous for the underwriters; for their meaning and purport are, "that if the ship or goods should be lost at the time of the insurance, still the underwriter, provided there is no fraud, is liable. (*b*) These "words" of this instrument have been used in practice by the merchants and underwriters of this country, till they have, at length, formed a material clause in the policy; and the effect of them on the parties to the contract, is fully upheld by the Courts of law. In the practice and law of marine insurance, the assured makes no assurance to the underwriter, that at the time of making the policy, the ship or goods are safe, or even in existence at that moment. This might appear at first sight too hazardous for the underwriters; but it *must be borne in mind the value of the amount of the premiums*, of the [*11] great number of the insurances *they underwrite, not one of which premiums, one may venture to say, out of a hundred, is paid under such circumstances, that the assured are by *law* enabled to recover them back from the underwriters.

If the loss has happened at the time of the execution of the policy, to the knowledge of the assured: or if the underwriter knows at the time he subscribes the policy of the safe arrival of the vessel, it is clear that, in both these

---

(*e*) 4 Camp. 66.

(*a*) Roccus, No. 175; 5 Burr. 2802.

(*b*) Molloy, b. 2, c. 7, s. 5. See the case of Blackhurst v. Cockrell, Trin. T. 29 Geo. 3, 3 T. R. 360.

cases, the policy would be *void* on the ground of *fraud.* There is a recent decision in the Court of King's Bench, in the case of *Mead* v. *Davison*, (*a*) in which the question of law arose, how far the circumstance of both parties to the contract being acquainted with the loss at the time of executing the policy, had an effect upon the contract; and the Court held that there was nothing illegal in an underwriter, who had received the consideration for entering into the contract, executing it afterwards with a full knowledge to both himself and the assured, that the loss had *actually happened.* Lord *Denman*, C. J., in delivering the judgment, says: "The case of *Earl of March* v. *Pigot*, (*b*) is a direct authority in favour of the right to recover, if the loss had been known to neither party at the time of executing the policy. According to that case, and indeed on the plainest general principles, if the loss had been known to the assured only, the policy would have been void. But no case has determined that an underwriter, who chooses to execute a policy with full knowledge that the loss has *actually happened*, may not be bound by it. His conduct might, indeed, appear extraordinary, if it were not clear that he had a good legal consideration for entering into the contract, viz:—the payment of the premium which may be regarded as a price actually given, and received for the underwriter's indemnity against the contingency which has happened. The assured has bought and paid for the underwriter's promise to indemnify. If the ship had arrived safe, the underwriter would have kept the whole premium; though *she has perished, he cannot be relieved from his agreement. Equity would have compelled him to execute the formal policy: [*12] in voluntarily executing it, he has only performed a manifest duty, and cannot now retract the obligation."

A very recent case (argued in the Court of Exchequer, H. Vacation, 1843,) of *Sutherland* v. *Pratt*, (*a*) may be conveniently mentioned in this place as very applicable to the subject. The facts will be sufficiently gathered for our purpose, from part of the judgment of the Court delivered on a subsequent day.

Parke, B.—"In this case the plaintiff declares in the usual form, that he caused to be made a policy of assurance, purporting thereby 'that Boggs, Taylor and Co., as well in their own name, as for all persons to whom the same *did*, *might*, *or should appertain*, made assurance, and caused *themselves* and *them* to be assured with the General Maritime Assurance Company, *lost or not lost*, from Bombay to London,'" upon any kind of goods and merchandise, &c., "beginning the adventure upon them from the loading thereof on board the ship, until her arrival and landing of the goods." The insurance was declared to be on 360 bales of cotton. The declaration then stated the admission in the policy, that the premiums, &c., mutual promises, &c. The declaration then avers, that the goods were loaded at Bombay, and then (which is not in the usual form,) that the plaintiff *was* "*during the voyage*" interested in the goods, in the policy mentioned, and so loaded, to a large amount to wit: the amount insured, and that the said assurance *was made* for *his use* and *on his account.* The ship is then stated to have been damaged by perils of the sea, and the goods thereby damaged, and rendered of no use to the plaintiff, &c. To this declaration the eighth plea alleged (which is the only plea we shall refer to at present) "that although the plaintiff acquired an interest in the goods, after the commencement of the voyage, to the amount insured, yet the goods were damaged, *and diminished in *use* and [*13] *value before* the plaintiff *acquired* or *had any interest therein*, and *not after.*" To this plea there was a general demurrer, which raises the only

(*a*) 3 A. & E. 303.
(*a*) 11 M. & W. 296.
(*b*) 5 Burr. 2802.

question on the merits of the case, the others being mere matters of form. We are of opinion that the eighth plea contains no answer to the declaration. The plea admits expressly that the plaintiff had *during the voyage an interest* in the goods on board, to the *amount insured therein;* and it admits impliedly (for it does not deny that allegation,) that the insurance was made for the use and benefit and on the account of the plaintiff, against any loss in respect of that interest, by any of the perils insured against. This being admitted, the simple question is, whether it is any answer to an action on a policy on goods "*lost* or *not lost*," that the interest in them was not acquired until after the loss. We are of opinion that it is not. Such a policy is clearly a contract of indemnity against all *past* as well as all *future* losses, sustained by the assured in respect to the interest insured. It operates in just the same way as if the plaintiff having purchased goods at sea—the defendants for a premium, had agreed that if the goods had at the time of the purchase sustained any damage by perils of the sea, they would make it good. The plea therefore is bad in substance.

SECTION III.

"AT AND FROM ——."

THESE words "at and from ——," in the policy, are intended to represent the name of the place at which the ship and the goods which are laden upon her sets out on her voyage, to which she is bound: as, for instance, "at and from *Bombay* to *London*." And this, according to the statement of the late Mr. Justice *Park*, in his valuable treatise, (*a*) "has always been held to be necessary in the policy, at least for upwards of two centuries, and must be so, [*14] on account of the *evident uncertainty which would follow from a contrary practice, as the assured would never know what the risk was which he had undertaken to insure."

Molloy has laid down this doctrine that, "if a ship be insured from *London* to , a blank being left in the policy, by the lader of the goods, to prevent a surprise by an enemy, and if, in her voyage, she happen to be cast away—though there be private instructions for her port—yet the assured must sit down with his loss, by reason of the uncertainty." He cites the case of Monsieur *Gourdan*, governor of *Calais*, which was decided, by the commissioners of assurance at *Rouen*, against the assured; because, although the bills of lading truly declared the *quantity* and *quality* of the *goods*, the *port* of the *ship's discharge was left blank*, on account of the *war* which was *then existing*. (*a*) Such, also, is now the law and usage of merchants. (*b*)

(*a*) Park Ins. 31.
(*b*) Park, 31.

(*a*) Molloy, b. 2, c. 7, s. 14.

SECTION IV.

"UPON ANY KIND OF GOODS AND MERCHANDISES."

The above words will lead us into the inquiry as to what description of "goods and merchandises" may form the subject of marine insurances when laden on ships. *Magens*, (*c*) in his enumeration, includes the *freight* or *hire* of ships under these words. This, however, as well as others which we shall see are *capable* of being the subject-matter of the insurance, can scarcely be said to come under the terms "goods and merchandises," unless "goods" are intended to include all descriptions of "chattels personal;" and it is usual to specify some kinds of the *property* to *be insured* by their proper names, for in many instances the *risk*, and, *of course*, *the premium*, would be greater. Horses, and other live and valuable animals, which would probably come under the denomination of "goods" in the policy, are, however, generally *declared* to be such kind of goods somewhere in the policy. *We will now commence stating some of the particular kinds of things or property which are not by law, or rather by the use of merchants, considered to come under the general term of "goods," and not to be included by them. [*15]

Thus *bottomry* and *respondentia*, which are *peculiar kinds* of property, may be the subject of marine insurance, but in the policy it must be particularly stated to be *respondentia* interest; for it has very long been decided by a case of *Glover* v. *Black*, (*a*) that, on a *general* policy "on goods," the assured *cannot recover money lent on bottomry*." The action was upon a policy of insurance "on goods and merchandises" loaden, or to be loaden, aboard the *Denham*, *W. Tryon*, commander, at and from *Bengal* to any parts or places in the *East Indies*, until her safe arrival in *London*. The evidence was, that, before the signing of the policy, the plaintiff had lent Captain *Tryon*, upon the goods then loaden, or to be loaden, on board the said ship, on account of the said Captain *Tryon*, the sum of £764, at respondentia, for which a bond was executed in the usual form; that the ship, at the time of the loss, had goods and merchandises on board, the property of Captain *Tryon*, of greater value than all the money he had borrowed; that the ship was afterwards burnt, and all the goods and merchandise were totally consumed and lost. Upon these facts the question was, whether the plaintiff could recover? This case was argued at the Bar; the Court took time to consider it, and were unanimous in their determination.

Lord *Mansfield*.—"I inclined at the trial, and since upon the argument, to support this insurance, being convinced that it is fair, and that the doubt has arisen by a *slip*, in omitting to specify (as it was intended to have been done) that this was a respondentia interest. The ground of supporting this insurance, if it could have been supported, was a clause in the 19 Geo. 2, c. 37, s. 5, which, as to the purpose of insurance, considers the borrower as having a right to insure only for the surplus value, over and above the money he has borrowed at respondentia. Yet we are all satisfied that this act *of Parliament *never meant* or *intended to make* any alteration in the [*16] manner of insurances: its view was, to prevent *gaming* or *wagering* policies, where the assurer had no interest at all; and if the lender of money at respondentia were to be at liberty to insure for more than his own interest, it would be a *gaming* policy: for it is obvious that, if he could insure all the goods and his respondentia interest besides, this would amount to an insurance more

(*c*) Magens, 4.

(*a*) 3 Burr. 1394; 1 Black. 405.

than his whole interest. In describing respondentia interest, the act gives the lender alone a right to make insurance on the money lent: so that the act left it on the *practice*. I have looked into the *practice*, and I find that *bottomry* and *respondentia* are a particular *species* of insurance in *themselves*, and have taken a *particular denomination*. I cannot find even a dictum in any writer, foreign or domestic, that the respondentia creditor may insure upon the *goods, as goods*. I find, too, by talking with intelligent persons, very conversant in the knowledge and practice of insurances, that they *always do mention respondentia interest* when they mean to insure it. It might be greatly inconvenient to introduce a practice contrary to general usage, and there may be some opening to fraud, if it be not specified. The ground of our resolution is, 'That it is now established, as the law and practice of merchants, that respondentia and bottomry must be specified and mentioned in the policy of insurance.'"

A *bottomry bond* usually expresses on the *face of it*, that the lender takes upon himself the *perils* of *the voyage:* but it is not necessary that this should be *express* and *in terms;* it is sufficient if the *fact can be collected* from the language of the instrument, considered in all its parts, and therefore a declaration in an action of insurance declared on a bottomry bond, is supported by an instrument of such description. This was held in the case of *Simonds* v. *Hodgson* (in error from the Common Pleas.) (*a*) Lord *Tenterden*, C. J., [*17] in delivering the judgment, said, "This case came before us by *writ of error from the Court of Common Pleas, wherein upon a demurrer to the declaration, judgment was given for the defendant. The declaration was upon a policy of insurance in the common form, declared to be on 'bottomry,' free from average, and without benefit of salvage. The declaration sets forth the instrument of bottomry, with proper averments to connect that with the policy. Upon the argument before us it was insisted in behalf of the plaintiffs, that the instrument set out in the declaration, was an instrument of bottomry, in the proper and legal sense of that word, in which the lender *takes upon himself* '*the risk of the voyage.*' On this point we are all satisfied that the judgment ought to be for the plaintiffs."

But it does not, therefore, *follow* that "special interests" in "goods," may not be recovered under the *common form* of an insurance upon "goods:" and Lord *Mansfield* himself, at the end of his judgment in *Glover* v. *Black*, expressly reserves both himself and the Court from having laid down *such a general* rule. (*a*) We have seen that according to 28 Geo. 3, c. 56, not only the persons who are interested in the assurance in "goods," but likewise the *consignor* or *consignee*, may declare on such a policy on goods, without stating their character in the policy." And see the case of *Wolff* v. *Horncastle*, (*b*) to which we have already referred at some length. (*c*) And *generally* it is *necessary* to state *accurately* "*the subject-matter*" of the *insurance*, but it is not *essential* to state the "*particular interest*" which the assured has in it. Thus, a person who has *several interests in a cargo*, viz: as *partner* in *seven-sixteenth*, as *consignee* of the *whole;* and as having a *lien as factor* on the *whole for advances:* may protect them all by one insurance, *without stating in the policy the number* or *nature* of *his interests*. (*d*)

In the recent case of *Crowley* v. *Cohen*, (*e*) which was an action on a policy [*18] of insurance on "goods" made by carriers; *it was objected for the defendants that the policy which pursued the *ordinary form*,

(*a*) 3 B. & Ad. 50. See also the full report of the judgment, p. 56, and see the form of the bond at p. 51.
(*a*) 3 Burr. 1401.
(*b*) 1 B. & P. 316.
(*c*) *Ante*, p. 4.
(*d*) Carruthers v. Sheddon, 6 Taunt. 14.
(*e*) 3 B. & Ad. 478.

did not cover the interest of the plaintiffs, since it purported to protect goods against the usual risks to which the *owners of goods* are liable; whereas, the *loss alleged* was *one arising out* of *the plaintiffs' liability as carriers, to risks to which carriers are liable.*

Lord *Tenterden.*—"It is objected that this policy is not framed so as to cover '*the interest*' in respect of which the plaintiffs claim. But I agree in the proposition laid down in the argument on their side, that although the *subject-matter of the insurance must be properly described*, the *nature* of *the interest* may *in general* be left at large. Here the subject-matter is very sufficiently described, and the policy shows that the sum to be received in case of loss, was to be for *further consideration*, 'as interest *might appear to be hereafter.*' The instrument is not artificially framed—it would have been better if it had expressly shown that the object was to indemnify the plaintiffs as carriers, still I think it is sufficient. (*a*) And in the case of *Lècras* v. *Hughes*, (*b*) Lord *Mansfield* says, 'insurance is a contract of *indemnity*,' *some interest* is *necessary*, but not any '*particular form of interest;*' it does not depend upon a vested formal interest."

Although the decision in *Glover* v. *Black* has been always upheld, yet in a subsequent case before Lord *Mansfield*, of *Gregory* v. *Christie*, (*c*) it was ruled that money expended by the captain for the use of the ship, and for which *respondentia* interest was charged, might be recovered under an insurance on "goods, specie, and effects," provided the usage of the trade, which in matters of insurance is always of great weight, sanctions it. This case was an action upon a policy of insurance on "goods, specie, and effects" of the plaintiff, who was also the captain, on board the ship: the plaintiff claimed under that insurance, money expended by him in the course of the voyage for the use of the ship, and for which *he charged *respondentia* interest. Lord *Mansfield* said as to the question, whether the words [*19] "goods, specie, and effects," extended to this interest, I should think not, if we were to consider only the words made use of. But here is an express usage which must govern our decision. A great many captains in the *East India* service swear, that this kind of interest is always insured in this kind of way. I observe the person insured here is the captain."

Secondly: it has been held that the master's clothes, or the ship's provisions, do not come under the term "goods;" nor "goods" *lashed on deck*, unless sanctioned by usage.

In the case of *Ross* v. *Thwaite*, Sit. after Hil. 16 Geo. 3, at Guildhall, (*a*) the action was brought upon a policy of insurance of "*the captain's goods*" for six months certain. The loss proved was *chiefly for* "*goods lashed on deck*," and the "captain's clothes" and the "ship's provisions." It was proved by an underwriter and a broker, that none of those things are within a *general policy* "on goods;" for the risk was greater, as to *goods lashed on deck*, than *other* goods: and a policy means only such "goods" as are *merchantable*, and a *part of the cargo.* They also swore, that when goods like the present are meant to be insured, they are always insured by *name*, and the *premium* is *greater.* Lord *Mansfield* said, he thought it consistent with reason, and understood the *usage was so:* therefore he advised the plaintiff to withdraw a juror, the premium having been paid into Court, to which he consented.

And in another case Mr. J. *Chambre* and a special jury, decided that "*goods stowed on deck*," were not within a *general policy* on "goods." *Backhouse* v. *Ripley*, Sit. after Mich. 1802, in C. P. (*b*)

(*a*) See Palmer v. Pratt, 2 Bing. 185.
(*b*) Park Ins. 569.
(*c*) B. R. Trin. 24 Geo. 3. Park Ins. 10.
(*a*) Park Ins. 23.
(*b*) Park Ins. 24.

But where there was an insurance on "*forty carboys of vitriol*," it was held to be *sufficient*, that they were carefully "*stowed on deck*," that being a *usual place for that commodity, without informing the underwriter of it;* and, although *it was usual sometimes to bed them in *sand in the hold.* [*20] *De Costa* v. *Edmonds.* (*a*) The Court afterward confirmed the decision at *Nisi Prius.* (*b*) And in the recent case of *Gould* v. *Oliver*, (*c*) it has been decided that the *owner of a cargo of timber* "*laden on deck*," pursuant to the custom of the particular trade, was entitled to contribution from the ship-owner in the case of a "general average." A subsequent action was brought by the plaintiffs against the ship-owner on the charter-party, in which the plaintiffs had a verdict with general damages. The reader is referred to the full report of this case, when cause was shown in the Common Pleas, against a rule which had been obtained for a new trial; (*d*) he will find in this case the subject of the "loading of a deck cargo," and the *practice* and *usage* relating thereto, fully discussed by the argument at the Bar, with reference to the evidence given at the trial. As the case was *not on a policy of insurance*, I must content myself with a few observations, copied from the judgment of Lord C. J. *Tindal.* He begins by stating, "this was an action of assumpsit on a charter-party, made between the defendant therein described as the owner of the ship, called the '*Christopher*,' then lying at London, of the one part, and the plaintiffs therein described as merchants of the other part, whereby it was agreed that the ship should sail with all convenient speed to *Quebec*, or as near thereto as she could safely get, and there load from the factors of the plaintiff, a full and complete cargo of pine timber deals, &c., '*not exceeding what she could reasonably stow and carry over and above her tackle*,' &c. The declaration assigned three breaches: *first*, 'that the defendant would not load in and on board the said ship, a full and complete cargo, *not exceeding what she could reasonably stow and carry, over and above her tackle*, &c., but on the contrary, 'loaded on board the ship a cargo, *much exceeding what the* [*21] *said vessel could reasonably stow and carry over *and above her tackle*, &c. The *second* breach was for 'carelessly and improperly loading *part of the cargo on deck*,' whereby the plaintiffs were prevented from insuring: and the *third*, for not taking *proper care* of the cargo, whereby it was lost. One objection to the direction of the Judge is, that he told the jury that if the '*loading the deck cargo increased the danger* of *navigation it was an improper practice;*' thereby, as it is said, *excluding the consideration* of *usage*, and making the increase of danger the *absolute test* of '*improper stowage.*' But the language of the learned Judge must be viewed with reference to the case before the jury. If 'a *particular mode of stowage' be conformable to the established usage of trade*, it may not be *improper*, though another '*mode of stowage' may be more safe.*" In this case it was proved that the *practice* of *stowing timber upon deck*" was very general, but also shown when the cargo was so loaded and a loss occurred, the shipowners in the absence of any stipulation to the contrary, had paid the loss to the shipper: and no instance was given in which the loss had been sustained by the shipper. It was further shown that insurances upon "*deck cargo*" could not be made unless at a triple premium: and *still* that it was not unusual to insert a *special clause* in the charter-party, that the ship should have a "*deck load.*" *Prima facie*, "the deck" is an *improper place for the cargo, or any part of it.* The duty of stowing the cargo belongs to the master; and no evidence was given of a *general custom* to load "a deck cargo" at the *risk* of the shipper. So

(*a*) 4 Camp. 142. (*b*) 2 Chitty, 227.
(*c*) 5 Scott, 445; B. N. C. 134; and see the case of Milward v. Hibbert, 3 Q. B. 120.
(*d*) 2 Scott's N. R. 241.

far as the evidence upon this subject went, it showed that whenever a loss had occurred, it had been made good by the *shipowner*, and consequently, he had no *right by custom* to throw the loss upon *the shipper*. The learned Judge, therefore, told the jury, that they were not to consider the matter with reference to the *custom*, but with reference to the *fact*, whether *the stowage was actually improper;* that is to say, whether it was *such as to increase the perils of the navigation*. The great body of the evidence on both sides was directed to the *question, whether the danger was increased or diminished, by the stowage on the deck? the plaintiff's witnesses stating the *former*, [*22] and the defendant's the *latter*. The question left to the jury was, *whether the timber stowed upon the deck was properly or improperly stowed?* the Judge telling the jury, "*that if it increased the danger* of *the ship*, or *increased the danger to that part of the cargo, in either case it was an improper stowage, because it tended to the injury of the shipper.*" It was finally left to the jury in the language of the issue, "was this cargo improperly stowed? The jury found that it was *improperly stowed:* and we do not think the direction to the jury, under the circumstances of the case, to exclude from their consideration the evidence of the practice, was wrong. For these reasons we are of opinion, that the defendant is not entitled either to enter a verdict for her, or to have a new trial, but we think a *venire de novo* should be awarded."

Thirdly, it has been thought that there was some doubt respecting the recovery of *money, gold and silver coin, and bullion*, after a loss under a policy on "goods and merchandises." This question does not appear to have had sufficient *doubt cast upon it* to afford any decision in our courts of law, as there is (according to the statement of the late Mr. J. *Park*, in his treatise) no case in the books in which the doubt was ever raised. In the case of *Da Costa* v. *Firth*, (*a*) the subject-matter of the insurance was bullion, and the policy was general on "goods and merchandises," but no objection seems to have been taken at that time. *Magens*, in his book "On Insurances," states, "that *gold and silver coined or uncoined, pearls*, and *other jewels, may be insured at London, Hamburg*, and other places, under the *expression in the policy* 'of *goods and merchandises*,' (*b*) and as goods *declared* in the policy 'bullion,' 'coin,' &c., there would be a sufficient notice of the value of the goods to inform the underwriters." The same writer gives a list of the ordinances of *several foreign states in which money shall *not* be *recovered, unless it be expressed in the policy* "*that it is money which is to be* [*23] *insured.*" (*a*) In France, these articles may be insured under the general terms "goods" and "merchandise," provided the transport of them be not prohibited. (*b*) *Roccus*, in his treatise, concurs in the opinion that these things may be insured under the *general expression* of *the policy*, where they *form part of the cargo*, and he draws a distinction between *them* and *money, jewels, and such things* as are on the *persons* or designed for the *wear* of *passengers on board:* the former, he says, is clearly *liable to contribute to a general average, and the latter not.* He says.—"Assecurans merces in talem navem immissas intelligitur assecurare pecuniam, aurum, argentum, gemmas margaritas et annulos in dicta navi existentes, quæ omnia appellatione mercium in navem immissarum, comprehendentur, licet expressa non fuissent Santerna declarat, quod si pecuniæ, margaritæ et annuli erant destinati ad vendendum vel mercandum alias merces, tunc appellatione mercium veniunt, et in assecuratione comprehenduntur et loco mercium habentur : vocat dictas res merces, cum occasione earum habeat locum contributio, sicut aliarum rerum, ne in istis asse-

(*a*) 4 Burr. 1966.
(*a*) 2 Magens, 71, 89, 131, 187.
(*b*) 1 Magens, 10.
(*b*) Emerigon, tom. 1, p. 297.

curationibus mercatorum potius apices juris, quam veritas observari videantur: et tandem quia large comprehenduntur omnes res, quæ sunt destinatæ ad negotiandum, et facit etiam, quod confiscatio mercium navis extenditur etiam ad pecuniam numeratam." (*e*)

Fourthly, the wages of mariners are not, by the laws of this country, allowed to form *the subject-matter of an insurance;* and this rule is agreeable, likewise, to the laws of all foreign *trading countries.* (*d*) This rule of law, *though apparently severe on the mariner, is nevertheless, it must be admitted,* based on *good policy,* as one of the greatest securities for the safe arrival of the vessel by the exertions of the sailors, which would, as a matter of course, be much diminished if they could protect themselves by such means. This [*24] *rule extends to the length of establishing another, viz :—"*That no seaman can avail himself of the insurance of the ship or cargo.*" In the case of the *Lady Durham,* (*a*) Sir *J. Nicholl* says, "It is thrown into the summary petition that the owner had made insurances on the homeward cargo; but '*that will not give the seaman a legal right to wages:* it may induce the owner to act with *liberality,* but it cannot *induce me to violate a principle and rule of law, whatever may be the hardship on the seaman.*' The *policy* of the law requires that *a seaman shall not insure his wages; he must take the risk of the ship, and stand by her at every hazard:* he has a *lien* on the *ship to the last plank, and on the freight which is appurtenant to the ship; and I think that, in principle, the king's advocate's argument is not remote, and that an insurance on the ship does not benefit the seaman; for if the seaman could look to the insurance of the ship as a security for his wages, it would be a substitution for his own private insurance, and would defeat the policy of the law.* A seaman knows whether the ship is insured or not, and if *such an insurance could enure to his advantage, it might make him indifferent or moderate, if not extinguish all exertion on his part.*"

This rule of law does not effect the *master* of the ship; and it has been holden that an insurance on the *commission, privileges,* &c., of the captain of a ship in the *African trade was valid, when that traffic was legal.* (*b*)

And in this respect the *English* law corresponds with the *French,* in allowing the captain of a ship to insure *goods which he has on board, or his share in the ship, if he be a part-owner.* (*c*) But a master of a ship has not a *lien on the freight for his wages, or for his disbursements on account of the ship during the voyage;* (*d*) and therefore a policy of insurance "on money lent to a captain of a ship, payable out of the freight, is *illegal and void on the face of it.*" (*e*)

[*25] *Fifthly, *freight,* or the *profit derivable from the carriage of goods,* or *hire of a vessel under a charter-party,* constitutes a *good insurable interest.* "It would, indeed, be extraordinary," says Mr. J. *Chambre,* in delivering his opinion in the case of *Lucena* v. *Craufurd,* (*a*) "if *freight could not be made the subject of protection by an instrument which had its origin from commerce, and was introduced for the very purpose of giving security to mercantile transactions.* It is a *solid, substantial interest, ascertained by contract, and arising from labor and capital employed for the purpose of commerce.* But even in this case the *existence of a subject out of which freight may arise,* or be *earned,* is *necessary,* as is settled by the case of *Tonge* v. *Watts,* (*b*) lately cited and approved of by

---

(*c*) Roccus, Not. 17.
(*a*) 3 Hagg. A. R. p. 200.
(*c*) Emerig. tom. 1, p. 236.
(*e*) Wilson v. R. Exchange Co. 2 Camp. 626.
(*a*) 3 B. & P. 102.
(*d*) 1 Magens, 18.
(*b*) King v. Glover, 2 New Rep.
(*d*) Smith v. Plummer, 1 B. & A. 575.
(*b*) 2 Strange, 125.

Lord *Kenyon*, in the case of *Thompson and Taylor.*" (*c*) When freight is intended to be insured it should be mentioned, *eo nomine*, in the policy. (*d*)

The owners have an insurable interest in the profits which they expect to make in carrying their own goods in their own ship; decided in the cases of *Flint* v. *Flemyng*, (*e*) and *Devaux* v. *J'Anson*, (*f*) which important cases will be more *fully referred to* in a subsequent part of this treatise.

Sixthly, *carriers* have likewise a *special property* in the *goods entrusted to their care*, and they may protect "*their interest*" in them by an insurance; and although it is not *absolutely necessary* to state *particularly* in the policy that it is their "*special interest as carriers*," still it is more *correct* to do so, as said by Lord *Tenterden*, in the case of *Crowley* v. *Cohen*, (*g*) which was mentioned before. (*h*)

There are many more instances in which the assured may protect his "interest" in different *mercantile concerns*, which we shall have presently to mention; it, however, is my object at present,

*Seventhly, to refer to a class of cases which have been by the statute law of the country declared to be *absolutely null* and *void.* [*26] This class are what are called *wager-policies*, or, in other terms, policies on "*interest or no interest.*"

Mr. J. *Park* (*a*) lays it down, that "the nature of the contract of insurance in its original state was, that a specific voyage should be performed, free from the perils of the seas;" and, in case of accidents during such voyage, the assurer, on consideration of the premium he received, was to bear the merchant harmless. It followed, from thence, that the contract related to the safety of the voyage, thus particularly described in respect either of ship or cargo, and that the assured could not recover beyond the amount of his real loss.

In process of time, however, variations were made, by express agreement, from the first kind of policy; and in cases where the trader did not think it proper to disclose the nature of his interest, the assurer dispensed with the assured having any interest either in the ship or cargo. In this kind of policy, valued *free from average* and *interest or no interest*," it is manifest that the performance of the voyage or adventure in a reasonable time and manner, and not the bare existence of the ship or cargo, is the object of the insurance. Such an object as that, with a reference to the real nature of insurance, "that it is a contract of indemnity" from a real and manifest, not from a supposed or ideal loss, must have been originally bad. Indeed it had been declared from the Bench, prior to the discussion of *Assievedo* v. *Cambridge*, (*b*) in the reign of Queen *Anne*, that such insurances were formerly held to be bad; for it is taken for granted in 1692 to be settled law that, in former times, if one had no interest, though the policy ran "interest or no interest," the insurance was void. After argument (but a second argument was ordered, but does not, from any reporter, appear ever to have been made,) it was held "that the defendant was entitled to judgment." Upon this case Lord *Mansfield*, *in the case of *Goss v. Withers*, has observed (*a*) "that the [*27] man-of-war which retook the ship, brought her into the port of *London*, and restored her to the owner upon reasonable redemption: (that appears from the special verdict;) and then the owner, not abandoning the ship, could only have

(*c*) 6 T. R. 478.
(*d*) 2 New Rep. 315; 11 Ves. 628; and see Baillie v. Moudigliani, B. R. Hill, 25 Geo. 3; Park Ins. 116.
(*e*) 1 B. & Ad. 45.
(*f*) 7 Scott, 507; 5 Bing. N. C. 519.
(*g*) 3 B. & Ad. 478.
(*h*) *Ante*, p. 17.
(*a*) Park Ins. vol. 2, p. 551.
(*b*) 10 Mod. 77.
(*a*) 2 Burr. 695.

come upon the insurers for the redemption; and no question could have arisen about the change of property. But the policy being 'interest' or 'no interest,' *without benefit of salvage*, the question arose upon the terms and meaning of the *wager*. That case was not determined." And his Lordship, relating the circumstances of the principal case of *Goss v. Withers*, says, (*b*) "whatever rule ought to be followed in favour of the owner against the recaptor or vendee, it can in no way affect the case of an insurance between the assurer and the assured. The ship is lost by capture; though she be never condemned at all, nor carried into any port or fleet of the enemy, the assurer must pay the value. If, after condemnation, the owner recovers or retakes her, the assurer can be in no other condition than if she had been recovered or retaken before condemnation. The reason is plain, from the nature of the contract. The assurer runs the risk of the assured, and undertakes to indemnify: he must, therefore, bear the loss actually sustained, and can be liable to no more. So that if, after condemnation, the owner recovers the ship in her complete condition, but has paid salvage, or been at any expense in getting her back, the assurer must bear the loss *actually* sustained. This point would not have been started in policies upon real interest, because it never could have varied the case, but *wager policies gave rise to it:* it was necessary to set up a total loss, as between third persons, for the purpose of their wager, though, in fact, the ship was safe, and restored to the owner. In the case of *Spencer* v. *Franco*, (*c*) the

[*28] *South Sea* ship, *Prince Frederick*, had returned safe to the *port of *London* with her cargo: the wagerers contended that she was "totally lost at *La Vera Cruz*," from this notion of a change of property, but failed. *Depaiba* v. *Ludlow* (*a*) was also a wager policy; and the property could not be changed, because there was then no war, nor even a declaration of war: but the Court held that, as the ship had been once taken in fact, the event had happened, though she was afterwards recovered." So in the case of *Pond* v. *King*, (*b*) which was also a wager policy. But in the case of *Fitzgerald* v. *Pole*, (*c*) the majority of the Judges and the House of Lords, in 1754, held "that, though the ship might be deemed *for a time* 'as lost,' yet, as she was afterwards recovered, the event of a total loss had not finally happened, according to the construction of the wager."

In the case of *Depaiba* v. *Ludlow*, before mentioned, the counsel there observed, and was not contradicted by the Court, that insurances upon "interest or no interest" were introduced since the Revolution: and from the date of the cases of wager policies mentioned by Lord *Mansfield*, in *Goss* v. *Withers*, this appears to be so; and if the law of *England* (as Mr. J. *Park* observes, (*d*)) previous to the Revolution, was more agreeable to the *true intention* of the contract between the assurers and assured, than it afterwards came to be—it was, according to *Magens*, (*e*) consonant to the laws on this subject of most of the commercial states in *Europe*, viz: of *Middleburg*, *Genoa*, *Konisburg*, *Rotterdam*, and *Stockholm*, by the regulations of which countries, all insurances upon wagers, or "as interest or no interest," are declared absolutely void, and of no effect.

In *England*, after the bad practice of resorting to these wagering contracts had come into use, the Courts of Justice, particularly the Equity, began very

[*29] soon to treat them in *a very unfavourable manner. In the case of *Goddart* v. *Garret*, (*a*) the defendant had lent money on a bot-

---

(*b*) 2 Burr. 694, 695.
(*c*) Before Lord Hardwicke, at Guild. 1735. Lex Merc. red. 4th. 316.
(*a*) Comyn's R. 360.
(*b*) 1 Wils. 191.
(*c*) 5 Bro. Par. Cas. 131, 214.
(*d*) Park. Ins. 552.
(*e*) 2 Magens, 70, 65, 88, 189, 257.
(*a*) 2 Vern. 269, Trin. Term, 1692.

tomry bond, but had no interest in the ship or cargo—the money lent was 300*l.*, and he insured 450*l.* on the ship; the plaintiff's bill was to have the policy delivered up: because the defendant was not interested in the ship or cargo.

Per Curiam.—Take it that the law is settled, that if a man has *no interest* and insures, the insurance is void, though it be expressed in the policy, "interested or not interested." The reason that the law goes upon is, that insurances were made for the benefit of trade, and not that persons unconcerned therein, and who were not interested in the ship, should profit thereby; and, where *one who would have the benefit of the insurance*, he *must renounce all interest in the ship*. And the reason why the law allows that a man having some interest in the ship or cargo may insure more, or five times as much, is, that a merchant cannot tell how much or how little his factor may have in readiness to lade on board his ship.—Per Curiam.—Decree the policy to be delivered up to be cancelled.

In another case of *Le Pypre* v. *Farr*, (*b*) which was a policy of insurance on goods by agreement, valued at 600*l.*, and the assured not to be obliged to prove any interest; the Lord *Chancellor* ordered the defendant to discover what goods he had on board; for, although the defendant offered to renounce all interest to the assurers, yet it must be referred to the master, to examine the value of the goods saved, and to deduct it out of the value or sum of 600*l.*, at which the goods were valued by the agreement. And by this decision, the Court held that the assured was only to recover an *indemnity*, which is the *true intent* and *meaning of the contract*.

But, notwithstanding the proper and legitimate view the Courts of Justice took of these descriptions of policies—the *practice* still continued of not confining the insurance to *real* *risks, and in the departing entirely [*30] from the spirit of the contract of insurance, which instrument, for the protection of trade, had *first* been introduced, bad and dishonest men began to endeavour to make themselves fortunes at once, by means of perverting the *design* and *utility* of this contract, which ought by law to be confined to the *real and serious risks*, which were to be *endured by merchants in fair dealing in trade*, and where the assurer for a *sufficient consideration, the premium, took upon him the assured's risk*, the practice which began to spring up after the Revolution of insuring *ideal risks*, grew to such a pitch, that the Legislature at length considered it fit to interpose, and by an act of the Parliament to stay this dangerous mode of trade, and to give it an effectual check, and by strong restrictive rules, to settle what "interest" a merchant should *by the statute law* be required to have, in order to be *allowed to recover* what he was *alone entitled to, a fair indemnity for his loss*, from the persons who had undertaken upon themselves his risk.

Accordingly an act of 19 Geo. 2, c. 37, was passed, intituled "an act to regulate insurances on ships belonging to subjects of Great Britain, and on merchandises or effects laden thereon."

"Whereas it hath been found by experience, that the making assurances 'interest or no interest,' or without further proof of interest than the policy, hath been productive of many pernicious practices, whereby great number of ships, with their cargoes, have either been fraudulently lost or destroyed, or taken by the enemy in time of war; and such assurances have encouraged the exportation of wool, and the carrying on many other prohibited and clandestine trades, which by means of such assurances have been concealed, and the persons concerned secure from loss, as well to the diminution of the public revenue,

(*b*) 2 Vern. 716.

as to the great detriment of traders; and by introducing a mischievous kind of gaming or wagering, under the pretence of assuring the risk on shipping and fair trade, the institution and laudable design of making assurances hath been perverted; and which was intended for the encouragement *of trade and navigation, has in many instances been hurtful of, and destructive to the same.

[*31]

"For remedy whereof be it enacted, that no *assurance or assurances* shall be made by any person or persons, bodies corporate, or politic, on any ship or ships belonging to his Majesty, or any of his subjects, or on any 'goods, merchandises, or effects,' laden or to be laden on board of any such ship or ships, '*interest or no interest*,' or without further proof of interest than the policy, or by way of gaming or wagering, or without benefit of salvage to the assurer, and that every such insurance shall be null and void. (*a*)

"That assurance on private ships of war, fitted out by any of his Majesty's subjects, solely to cruise against his Majesty's enemies, may be made by the owners thereof, interest or no interest, free of average, and without benefit of salvage to the assurer: anything herein contained to the contrary thereof in anywise notwithstanding. (*b*)

"That any merchandises or effects from any ports or places in *Europe* or *America*, in the possession of *Spain* or *Portugal* may be assured in such way and manner as if this act had not been made. (*c*)

"That all and every sum and sums of money to be lent on bottomry or at respondentia, upon any ship or ships belonging to any of his Majesty's subjects, bound to or from the *East Indies*, shall be lent only on the ship, or on the merchandises, or effects laden, or to be laden on board of such ship, and shall be so expressed in the condition of the bond; and the benefit of salvage shall be allowed to the lender, his agents or assigns, who *alone shall have a right to make assurance on the money so lent:* and *no borrower of money on bottomry or respondentia, as aforesaid, shall recover more on any assurance than the value of the ship or of the merchandises or effects laden on board such ship, exclusive of the money so borrowed;* and in case it shall appear that the value of his share of the ship, or in the merchandises or effects laden on board, *doth not amount* to the *full sum* or *sums he had borrowed* as aforesaid, such borrower shall be *responsible* to so much of the money borrowed as he *hath not laid out* on the ship or merchandise laden thereon, with lawful interest for the same, together with the assurance and all other charges thereon, in the proportion the money not laid out shall bear to the whole money lent, notwithstanding the ship and merchandise be totally lost." (*a*) Upon the last section it is observable that *none but the lender* shall have a right to make insurance on the money lent. It is also to be observed, that this regulation of insurance on bottomry or respondentia, extends only *to East India ships:* and, therefore, an insurance of a respondentia interest upon any other ship, may be made in the same manner as they used to be before this act.

[*32]

It has been decided upon this clause of the act, that it never meant, or intended to make, any alteration in the manner of insurances; and it was declared by the Court, in *Glover* v. *Black*, before referred to, (*b*) that the established law and usage of merchants was, that respondentia and bottomry must be specified by name in the policy of insurance.

By the first section of the act, all policies of insurance made contrary to it are absolutely void, and of no effect.

(*a*) Sect. 1.
(*b*) Sect. 2.
(*c*) Sect. 3.
(*a*) Sec. 5.
(*b*) *Ante*, p. 15.

I proceed now to consider, *first*, the cases which have, by the decisions of the Courts upon this act, been held not to fall within the description.

The 19 Geo. 2, c. 37, does not extend to insurances on *foreign property*, for in fact they do not come within the *words* of the statute. This point has also been set at rest by several decisions in the courts of law, *Thellusson* v. *Fletcher;* (*c*) and it was much discussed in the case of *Craufurd* v. *Hunter.* (*d*) In this case one question was, the insurance being in *Dutch* prize-ships, whether a count in the declaration averring that the plaintiffs, as commissioners for the disposal of *Dutch* ships and effects, made the *insurance, *and that the said ships, or any of them, were not belonging to* [*33] *his Majesty, or any of his subjects*, was good. The point was argued on demurrer.

Lord *Kenyon.*—"This question depends on the construction of the statute 19 Geo. 2, c. 37; for, notwithstanding the argument, I think, at *common law, a person might insure without having any interest;* but the preamble and the enacting clause remove all doubt: for the act recites the mischief and inconveniences that had arisen from making assurances 'interest or no interest,' and then it enacts (not declaring) that no such assurance shall be made, except in certain cases, which, for very wise and politic reasons, were excepted. Therefore I am satisfied that this count is good, unless on an insurance prohibited by the statute. But that statute only applies to ships belonging to his Majesty or any of his subjects, and does not extend to foreign ships."

In the recent case of *Sutherland* v. *Pratt*, (*a*) the declaration stated, "that the plaintiff caused to be made a policy of insurance, purporting thereby and containing therein that Messrs. Boggs, Taylor & Co., as well in their own names as in the name, &c., did make an assurance, and cause themselves to be assured, with the General Marine Insurance Company, 'lost or not lost,' at and from *Bombay* to *London*, upon any kind of goods, &c., &c., and beginning the adventure from the loading of said goods on board the said ship, and until the same should be there discharged and safely landed. The insurance was declared to be on 300 bales of cotton. The declaration went on in the ordinary form, and then averred that the said goods were, on 1st September, 1841, shipped at *Bombay*, on the *said voyage;* that the plaintiff was, *during the said voyage*, interested in the said goods in the said *policy mentioned*, and laden on board the *said* ship, to the amount insured; that the *said insurance* was made *for the use and benefit* and *on the account of the plaintiff* as aforesaid; that the said ship afterwards sailed on the said voyage, and being injured by tempestuous weather, *whereby the said goods were wetted and damaged, and rendered of no use or value to the plaintiff. [*34]

The eighth plea, after stating "that though the said ship, with the said goods on board, departed and set sail upon the said voyage from *Bombay* to *London*, and although the said goods were damaged and diminished in use and value on the said voyage; and although, after the commencement and during the course of the said voyage, and after the ship had sailed on the said voyage for divers days, to wit, thirty-five days; and for divers miles, to wit, 1000 miles, the plaintiff acquired an interest in the said goods, and then, to wit, on the 10th day of September, 1841, became and was interested in the said goods, to wit, to the value and amount in that behalf mentioned; nevertheless that the said goods were so damaged and diminished in value, as in the declaration mentioned, *before the plaintiff acquired or had any interest therein.*" To this plea the

(*c*) Doug. 315.
(*d*) 8 T. R. 13, and see Lucena v. Craufurd, 1 Taunt. 325, referred to at *ante* p. 7.
(*a*) 11 M. & W. 296.

plaintiff demurred generally. *Martin*, the counsel for the plaintiff, in support of the demurrer, said the question of substance which had arisen on the demurrer was, whether it *was legal to enter into such a contract of insurance* as is mentioned in the eighth plea? This was a case of a policy of goods, "lost or not lost," at and from *Bombay* to *London*, beginning the adventure from the lading of the goods on board the ship till their arrival and safe discharge in *London*. The defendants, *therefore*, *expressly contract to the plaintiff* to be *responsible* to the *plaintiff from the loading* of the goods at *Bombay*, till their arrival and safe discharge at *London*. The plaintiff is admitted by the plea to have become interested in the goods *during the voyage*, and the defendants have engaged to become responsible to him for any loss they have sustained during the entire course of that voyage. Why are they not to be held to their contract? At the *common law a contract of insurance was legal, without any interest* in the assured. *Craufurd* v. *Hunter*, (*a*) confirmed by the Court [*35] of Exchequer Chamber in *Ireland*, in the case of the *British Assurance* **Company* v. *Magee*. (*a*) Is there, then, anything in the statute 19 Geo. 2, c. 37, to affect this case? That statute enacts, "that no assurance shall be made on any *British* ship, or any 'goods, merchandises, or effects,' laden on board of any such ship or ships, 'interest or no interest,' or without further proof of interest than the policy, or by way of gaming or wagering, or without benefit of salvage." This is not a case where there is no proof of interest than the policy, nor is it a case of "gaming or wagering." The plaintiff has the interest of a pledgee, and to protect himself against loss, as such makes an assurance: there is nothing illegal in that either at common law or by the statute. He had the greatest possible interest in the arrival of the goods in the condition in which he supposed them to be, when he made the advance on them so as to secure him from loss. Judgment was given for the plaintiff on the demurrer, as we have already seen in Section II. (*b*)

In the above case the defendants pleaded, in the first place, *non assumpsit;* upon which issue was joined, and was tried before Lord *Abinger*, C. B., Sit. after Trin. Term, 1843. At the trial, it appeared that the insurance in question, (*c*) had been made by Boggs, Taylor & Co., who were the consignees of the goods in question, for the security of the plaintiff, to whom they had pledged the bill of lading, which was indorsed generally to bearer, as a security for certain bills of exchange accepted by the plaintiff for the accommodation of Boggs, Taylor & Co., and which the plaintiff refused to accept until Boggs, Taylor & Co. had made the insurance in question, and deposited the policy with him. It was contended for the defendants, that this was not sufficient to entitle the plaintiff to sue, in his own name, on the policy. The Lord Chief Baron overruled the objection, and a verdict was given for the plaintiff.

[*36] In the Term following, a rule for a new trial was moved *for, on the ground of misdirection. (*a*) The counsel for the defendants contended that a mere pawnee of a policy of insurance cannot sue in his own name.

Parke, B.—"Or rather whether the pawnee of goods assigned to him by the indorsement of the bill of lading can insure them?"

The counsel for the defendants contended that, if Boggs, Taylor & Co. intended, in case they paid off the acceptances, to have the right in their own

---

(*a*) 8 T. R. 13.
(*b*) *Ante*, p. 12.
(*c*) See the declaration in the last case, *ante*, p. 12.
(*a*) 12 M. &. W. 16.
(*a*) Cooke & Alcock, 182.

names to sue, they could not, by depositing with the plaintiff, vest the right to sue in him.

Parke, B.—"The question is one of fact—whether the insurance was not made for securing the interest of the plaintiff?"

Parke, B.—"If, before any arrangement with the plaintiff, Boggs, Taylor & Co., had insured the goods, and then had agreed for the deposit of the bill of lading and the policy with him, I agree they would have been the persons to sue; but here it was a question for the jury, 'whether the insurance was not made by them as agents, and for the benefit of the plaintiff?'"

Lord *Abinger*, C. B.—"The evidence was, he refused to accept till they had made the insurance. In such a case, if the party cannot sue in his own name, how can he have the benefit of the pledge?"

Parke, B.—"It seems to turn entirely on a question of fact; and there is very good evidence that the policy was made for the benefit of the plaintiff, to cover his interest in the goods; and it is clear he had an insurable interest."

Per Curiam.—Rule refused.

But in the case of *Powles and others* v. *Innes* (*b*) it was decided, that where a person has assigned away his interest in a ship or goods, after making a policy of insurance upon them, he cannot sue upon the policy, except as a trustee for the assignee, in a case where the policy is handed over to *him upon the assignment, or there is an agreement that it shall be kept alive for his benefit. [*37]

It has been quite settled that a valued policy is not a wager-policy, though there existed at one time a little confusion in the minds of some about the two descriptions, which, however, has been cleared away by the lucid explanation of the difference between the two by Lord *Mansfield*, Lord *Kenyon*, and others of the Judges.

In the important case of *Lewis and Another* v. *Rucker*, (*a*) Lord *Mansfield*, delivering the resolution of the Court upon the whole case, says,—"The second objection with which this case has been much entangled is taken from this being a *valued* policy. I am a little at a loss to apply the arguments drawn from thence. It is said 'that a *valued* is a *wager policy*' (like 'interest or no interest,') if so, there can be no *average* loss, and the assured can only recover as for a *total*, abandoning what is saved, because the value specified is fictitious." A *valued* policy is *not* to be considered as a *wager* policy, or like 'interest or no interest;' if it was, it would be *void by the act*, 19 *Geo.* 2, *c.* 37. The only effect of the valuation is fixing the amount of the prime cost, just as if the parties admitted it at the trial; but in every argument, and for every other purpose, it must be taken that the value was fixed in such a manner as that the assured only meant to have an indemnity. If it be undervalued, the merchant himself stands assurer of the surplus. If it be much overvalued, it must be done with a bad view: either to gain, contrary to the act of the late king, or with some view to a fraudulent loss. And, therefore, the assured never can be allowed in a Court of Justice to plead that he has greatly overvalued, or that his interest was a trifle only. It is settled 'that, upon valued policies, the merchant need only prove *some interest*, to *take it out of the* 19 *Geo.* 2, because the adverse party has admitted the value, and if more was required, the agreed valuations would signify nothing;' but, *if it should come out in proof that a man had insured 2000*l.*, and had *interest to the value of a cable only*, there never has been, and I believe there never will be, a determination that, by *such an evasion*, the act of Parliament may be defeated. There are many conveniences from allowing valued policies, but [*38]

(*b*) *Ante*, p. 8.

(*a*) 2 Burr. 1170.

where they are used merely as a *cover* to a wager, they would be considered as an *evasion*. The effect of the valuation is only fixing conclusively the prime cost. If it be an open policy, the prime cost must be proved—in a valued policy it is agreed. (*a*) To argue "that there can be no adjustment of an average loss upon a valued policy," is directly contrary to the very terms of the policy itself. It is expressly *subject to average*, if the loss upon sugars *exceed 5 per cent.;* if it was not, the consequence would not be that every partial loss must thereby become total, but the event, to entitle the assured to recover, would not happen, *unless* there was a total loss. Consequently the plaintiffs in this case would not be entitled to recover at all; for there is no colour to say this was a total loss. Besides, the plaintiffs have taken to the goods, and sold them.

Eighthly, profits expected to be made are a "good insurable interest." The doctrine laid down by Lord *Mansfield* in the above case was acted upon by his Lordship in a subsequent case of *Grant* v. *Parkinson*. (*b*) It was an action on a policy of insurance on the ship *Providence*, "at and from *Surinam*, or *whatsoever other ports in the West Indies at which the ship might load*, to *Quebec*." At the trial, before Lord *Mansfield*, at the Sit. after Trin. Term, the principal question on the merits was, whether the plaintiff had an *insurable interest*. It was an insurance on the profits expected to arise on a cargo of *molasses*, *belonging to the plaintiff*, who had a *contract with Government* to supply *the *army with spruce beer*. Lord *Mansfield* thought it an insurable interest. But the part of the case which calls for our attention at present was a clause declaring "that, in the case of loss, it was agreed that the profits should be valued at 1000*l*., without any other voucher than the policy." This, it was insisted, rendered the policy void, within the spirit of the 19 Geo. 2, c. 37. Lord *Mansfield*, at the trial, inclined to think the contract was a fair one; but still he could not get over the objection, the instrument being void on the face of it. His Lordship, however, saved the point for the opinion of the Court, a verdict being entered for the plaintiff, subject to that reference. In Michaelmas Term following the matter came on to be heard, when, after *full argument at the Bar*,

[*39]

Lord *Mansfield*, C. J., said.—"I have, since the sitting at *Guildhall*, on further consideration, changed my opinion. I then thought the present policy within the act of Parliament, I now think otherwise. On the construction of the act, it has uniformly been held that a *valued* policy is not *void*. It is *incumbent on the plaintiff to prove some interest*, but it is not necessary to *go into the whole value*. In the case of *Lewis* v. *Rucker*, (*a*) this doctrine was much considered. (His Lordship read the words already mentioned in that case, and proceeded.) This insurance is on "the profits" of a cargo belonging to a man having a contract to supply the army, and if it arrive the profits are pretty certain. The meaning of the policy is not to evade the act of Parliament, but to avoid the difficulty of going into an exact account of the *quantum*. I cannot distinguish this from a valued policy: there is no pretence for saying it is a *wagering* one."

The other Judges concurred, and the postea was given to the plaintiff.

If the plaintiff *must prove his interest, and the policy only saves him the trouble of showing its amount, it is a valued policy and good; but if it dispenses with all proof of interest, it is within the act and void.* Thus in

---

(*a*) By the usage at Lloyd's where liberty is given by the policy "to declare and value" after the policy is executed, and no declaration or valuation, it is considered as an open policy. 2 B. & Ad. 651. And see Harman and others v. Kingston, 3 Camp. 150.

(*b*) 22 Geo. 3, in B. R. Mich. Park Ins. 561.

(*a*) *Ante*, p. 37.

the case of *Murphy* v. *Bell*, (*b*) where a policy of insurance stipulated, "that the *goods insured were, and should be valued at five tierces of coffee, valued at 27*l.* per tierce, say 135*l.*; the policy to be a sufficient proof of interest," it was held that the policy was void under the act. *Best*, C. J., said, "This is a full admission of all which the assured would be required to prove, as well as to his having goods on board, as to the value of those goods. The words 'should be valued at five tierces of coffee,' admit that five tierces of coffee belonging to him were on board. That would dispense with the necessity of proving that any coffee belonging to the plaintiff was on board. The words 'the policy to be deemed sufficient proof of interest,' are of precisely the same import as the words 'without further proof of interest than the policy.' As no inquiry is to be made whether the assured had any property in the ship insured or not, it is in effect an insurance 'interest or no interest.'" [*40]

In a case before Lord *Kenyon*, (*a*) where the interest was stated in the policy to be "on the commissions of the plaintiff, as consignee of the cargo, valued at 1500*l.*" His Lordship expressed a strong opinion that this was a good insurable interest, but the matter being compromised, it did not come to any decision. Afterwards the question was brought for the opinion of the Court upon a case reserved. (*b*) The policy stated the insurance to be on profits valued at 2,000*l.* The declaration averred, and the fact was, that the *assured was interested in the profits to arise, and be made*, from the sale *and disposal of the said cargo of goods*. This case was twice argued at the Bar, once in the time of Lord *Kenyon*, and after taking time to deliberate the judgment of Mr. J. *Grose*, Mr. J. *Le Blanc*, and himself, was delivered by Mr. J. *Lawrence*, in a luminous manner, who declared at the close of it, that Lord *Kenyon* concurred in the judgment. The decision was, that such profits were the subject of insurance. Mr. J. *Lawrence* in this judgment, refers largely to the foreign writers on this subject.

*The case states, that the insured shipped on board the ship *Jonah* a cargo of goods, to be carried on a trading voyage: so that it appears that he had an interest in the profits to arise from a cargo, which was liable to be affected by the perils insured against. And the question is, if, on an insurance made on the profits to arise from such cargo, the plaintiff can recover? As insurance is a contract of indemnity, it cannot be said to be extended beyond what the design of such species of contract will embrace, if it be applied to protect men from those losses and disadvantages which, but for the perils insured against, the assured would not suffer; and in every maritime adventure the adventurer is liable to be deprived not only of the thing immediately subjected to the perils insured against, but also of the advantages to arise from the arrival of those things at their destined port. If they do not arrive, his loss in such case is not merely that of his goods or other things exposed to the perils of navigation, but of the benefits which, were his money employed in an undertaking not subject to the perils, he might obtain, without more risk than the capital itself would be liable to: and if, when the capital is subject to the risks of maritime commerce, it be allowable for the merchant to protect that by insuring it, why may he not protect those advantages he is in danger of losing by their being subjected to the same risks? It is surely not an improper encouragement of trade to provide that merchants, in case of adverse fortune, should not only not lose the principal adventure, but that that [*41]

(*b*) 4 Bing. 567.
(*a*) Flint v. Le Mesurier, sit. after H. T. 1796, at Guild. Park Ins. 563.
(*b*) Barclay v. Cousins, 2 East. 544.

principal should not, in consequence of such bad fortune, be totally unproductive; and that men of small fortunes should be encouraged to engage in commerce, by their having the means of preserving their capitals entire, which would continually be lessened by the ordinary expenses of living, if there were no means of replacing that expenditure, in case the returns of their adventures should fail. Where a capital is employed subject to such risks, in case of loss, the party is a sufferer by not having used his money in a way which might, with a moral certainty, have made a return not only of his principal *but of profit: and it is but playing with words to say that, in [*42] such case, there is no loss, because there is no possession; and that it is but a disappointment. Foreign writers upon insurance, whose doctrines form the greatest part of our law on this subject, certainly do not treat of insurance on profits as a matter inconsistent with the true nature and design of such a contract; and where it is spoken of by them as a species of insurance which cannot be made, this latter doctrine will be found to be referable to the positive institutions of different nations, who have thought it wise to prohibit it. *Roccus*, an *Italian* jurist, inquiring how goods that are lost are to be valued, has in his *Notabilia de Assecurationibus*, No. 3, this passage: 'Distingue aut merces fuerunt æstimate pro certâ quantitate tempore contractus assecurationis, et tunc non sumus in dubia quia dicta quantitas æstimata solvenda est; aut assecuratio fuit facta pro asportandis mercibus salvis *Roman, et tunc æstimatio inspicienda est Romæ.* Aut assecuratio fuit facta *simpliciter*, de solvendo æstimationem seu valorem mercium, in casu periculi, si navis perierit, et tunc inspici debet tempus obligationis, et prout tunc valebant, debet fieri æstimatio, et *sic damnum* quod assecuratus patitur in amissione rei, non *lucrum* fasciendum consideratur." And for this he cites *Santerna*, a *Portuguese* lawyer, *de Assecurationibus*, part the 3d, num. 40 and 41; in which book there is a long disquisition to show that, in this latter case, the profit on the goods is not to be paid, but only the value at the time of the insurance. So that it seems the insurance of profit is so far from being inconsistent with the nature of insurance, that, *e contrà*, *Santerna* thinks it necessary to show by argument, that the profit is not to be considered in all cases; and that where the assurance is made *simpliciter*, then *lucrum non spectatur.* And *Straeca*, another *Italian* lawyer, agrees with *Santerna* in his Gloss, No. 6. In *France* such assurances were unlawful; but that depends, according to *Valin*, on the ordinance of the marine, which also forbids insurance upon freight; and the reason given by *Valin* for making these ordinances, with respect to the one and [*43] the *other, is the same; so in *Holland*, it appears from *Bynkershoek's* Quæstiones Juris Privati, book 4, c. 5, that such insurances cannot be legally made there; but that is by the positive laws of that country; notwithstanding which, the practice has so generally obtained to insure expected profits, as that in a case he there states, the majority of the Judges of the Court where the question arose, determined in favour of the assured; and those who opposed that decision, rested their opinions on the positive laws of the country, and not on such contracts being contrary to the nature of insurance. In this country, there is no law forbidding such insurance; unless it could be shown that the insured had no interest in the profits, or that from its nature it must be a mere wager, so as to bring the case within the stat. 19 *Geo.* 2; and that they are not considered as contracts inconsistent with the general nature of insurance is proved, by the instance put of an insurance on freight; which, as was very truly argued at the Bar, differs only from the case now before us in the same degree as a return of capital vested in shipping differs from a return of capital vested in merchandise: and by the cases of *Grant* v. *Parkinson*, in *Marshall*, 95, 3d edit.; and *Park.* 561, 8th edit., which was an insurance on profits of a cargo of molasses; and the case of *Henrickson* and *Walker*, and

Henrickson and *Margetson*, *Mich.* 1776. (*a*) The authority *of *Grant* and *Parkinson*, as applied to this case, has been attempted [*44] to be gotten rid of by observing that the thing insured there was the profits of a specific cargo: but in that respect the two cases do not differ; for this is an insurance on a specific cargo; and we have no ground to say that the profits of a cargo to be exchanged in the *African* trade, from which exchange the profits will arise, are not, to use the expression of Lord *Mansfield* in *Grant* and *Parkinson*, pretty certain; admitting, for the sake of the argument, which it is not necessary for us now to determine, that in some mercantile adventures there may be so much uncertainty as to the profits, as to make it not impossible to insure them without the policy being a wagering contract. This, however, we cannot presume of the returns to be made from an adventure undertaken according to a long established course of trade like that in question, in which numbers have been engaged to great advantage for a continued succession of years. It has been objected to this sort of insurance, that the subject having no physical existence, cannot be insured. This objection would hold against insuring freight, and bottomry, *and respondentia interest. Again, that the goods might be going to a losing market; in which case, the [*45] assured would gain by the loss of his goods; but if that were the case, it would be evidence on *non assumpsit*, as it would prove either that the plaintiff was not damnified as to profit by the loss of the goods; or that at the time of the loss, he had no interest in the thing insured. It was further objected, that there can be no average nor abandonment; but that objection does not hold in the present case; for if there be only a partial loss, the assured will only be liable to pay for the expected profits on the goods lost; and there may be an abandonment of the profits by abandoning the goods from whence the profits are to arise: and as to general average, there would be no difficulty in the case of a valued policy; and in the case of an open policy, the difficulty would be

---

(*a*) Mr. Justice *Lawrence* read the following note of that case at the time:

Henrickson v. Margetson, and the same against Walker. These were two actions on the same policy, against two different underwriters. It was a policy of insurance at and from Bordeaux to Hamburgh, *on imaginary profit*. The declaration stated the policy 14th December, 1775, on the ship *Thomas*, of Bremen, on indigo valued at 9,600*l.*; under which policy was a memorandum, viz: the following is on *imaginary profit* at 3½ per cent., and in case of loss, to pay without further proof of interest than this policy. The plaintiff averred, that the ship was not a ship belonging to his majesty, or any of his subjects; and that the *imaginary profit* mentioned in the said memorandum was, and is understood and meant "to be the profit which the said cargo of indigo would produce upon the sale thereof at Hamburgh, if the same should arrive there in safety." That the defendant became an assurer of 200*l.* on the said imaginary profit; that the cargo of indigo was on board to the value insured; "and that the plaintiff was interested in the cargo of indigo and the imaginary profit thereof;" and that the ship and cargo were on the voyage lost, by the perils of the sea; and the cargo and all profit thereof wholly lost to the plaintiff.

The cause was tried at the sittings after Trinity Term, 1776, at Guildhall, before Lord *Mansfield*, when a verdict was found for the plaintiff.

In Michaelmas Term, 1776, a motion was made for a new trial. It appeared by the report, that the ship was totally lost off Scily; but that all the cargo, except one barrel of indigo, was saved and carried to Hamburgh in another ship, at the expense of the underwriters; and the question made on the motion for a new trial was, Whether the ship being lost, but the cargo carried to Hamburgh in another ship, the assured could recover as for a total loss of the profits? But the Court held, that there should not be a new trial; that the underwriters were not at liberty to send the cargo to Hamburgh at what time and in what ship they pleased. Lord *Mansfield* said, the meaning of the policy seems to be, that the ship and cargo shall arrive at the destined port, and is on the profit of that particular ship and cargo; but the market varies, and may depend on twenty-four hours sooner or later, so that unless the very ship and cargo arrive, the profit may fail, and the insurance is lost.—Rule discharged.

no greater than in ascertaining the damages in case of loss: the impossibility of doing which, in *every* case, will not prove that an insurance can be made on profits in *no* case. A considerable time has elapsed between the first and second argument of this case, in consequence of a writ of error in the Exchequer Chamber in another case, the decision of which might have had weight in favour of the defendant, had it been determined otherwise than it has been. The grounds of that decision we are not acquainted with, so as to say whether they will support this case: but as that determination does not militate with the opinion Mr. J. *Grose*, Mr. J. *Le Blanc*, and I have formed, and I may add that of Lord *Kenyon* on hearing the first argument, we do not think it fit that we should longer delay the judgment of the Court."—Postea to the plaintiff.

In the case of *Eyre and Another* v. *Glover*, (*a*) which was an action on a policy of assurance in the common printed form, on a voyage from *Riga* to *Hull*, upon "goods," and also upon the body of the ship *Elizabeth*, &c., it was stated "that the said ship, &c., goods and merchandises, &c., for so much as concerned the assured by agreement between the assured and assurers in the [*46] policy, are and shall be on profits *(without further description,) &c." The declaration, after setting out the policy, alleged the promise of the defendant as an underwriter thereon for 200*l.*, in consideration of forty guineas premium, and then stated that the ship on the said day (the date of the policy) was in good safety at *Riga*, and divers goods of great value were then loaded on board her, to be carried on the voyage insured, and that the plaintiffs were then and from thence until and at the time of the loss aftermentioned, interested in the said goods and in the profits expected to be made thereon, to the amount for the money insured on the said goods and the said profits respectively; and that the said policy was made on the said profits, and for the use and benefit of the plaintiffs. The declaration went on to state, that the ship sailed on a certain day, &c., on the voyage insured, and in the course of the same voyage, and on the same day, was captured with the goods, &c., whereby, &c., the defendant became liable to pay the 200*l.* At the trial before Lord *Ellenborough*, at Guildhall, it appeared that the plaintiffs had chartered the *Elizabeth* from *Hull to Riga*, to receive from their agents a full cargo of hemp, and at the time of the capture the *invoice value* of the *cargo* was 5116*l.*, the profit on which, supposing the whole of it to have been shipped, and arrived in a sound state, would have been to the amount insured—1000*l.* An objection was taken at the trial that this was a gambling policy, and therefore void; but Lord *Ellenborough* overruled the objection, seeing no difference, in principle, between an insurance on profits valued, which had been held to be legal, and on profits without the valuations being ascertained in the policy, but left open to proof afterwards—"id certum est quod certum reddi potest;" and the flax must be taken to have been shipped in a sound state, the contrary not appearing. The plaintiffs having recovered a verdict, a motion was made for a new trial, or an arrest of judgment, on the grounds that profits generally, without more certainty, could not be insured.

[*47] Lord *Ellenborough*, C. J.—"Are profits anything more *than an excrescence upon the value of the goods, beyond the prime cost? The difficulty of calculation cannot affect the question of interest, or the legality of the contract."

Rule refused.

So in the case of *King* v. *Glover* (*a*) the Court were of opinion that an *African* captain, who was entitled, besides his wages, to so much per cent.,

(*a*) 16 East, 218; 3 Camp. 276.

(*a*) 2 N. R. 206.

and other privileges, for his trouble of buying slaves on the coast of *Africa* and disposing of them in the *West Indies*, had a good insurable interest in this remuneration.

But, in order to enable the assured to recover on an insurance on "profits," he must establish in evidence that he has sustained a loss by one of the perils insured against: that is, he must show that if the peril insured against had not intercepted the profit, that profit would have accrued to the assured.

And therefore in the case of *Hodgson* v. *Glover*, (*b*) where a valued policy on profits was made, and a part of the cargo (slaves) were lost by shipwreck, though the remainder were brought to market and sold, but the assured did not show what profit was made, or, if all the slaves had arrived at the market, there would have been any profit, it being only stated that the produce of the part sold did not give a profit upon the whole adventure, the assured failed to recover in the action for want of proof in his interest.

Mr. J. *Lawrence* says:—"According to the plaintiff's own showing, this is only an average loss. The case of *Barclay* v. *Cousins*, (*c*) did not go the length of directing that the plaintiff was at all events entitled, under a policy on 'profits,' to recover to the full extent of the sum insured. What was there said was only to show the general insurable nature of profits."

In the class of insurances which has for some space been the subject of our consideration it is to be remarked that, although the subject-matter of the expected profit may not *have an existence at the time of the insurance, there is, however, a description of certainty (distinct from [*48] what is merely a speculative expectation) required to render this species of property insurable. For where the benefit which the assured expects is only of a speculative nature, attended with no certainty of completion, and requiring the event he wishes to be insured to happen, before he can possibly know whether it can ever come to pass, is considered by far too remote an interest to make the subject of an insurance, and not sufficiently palpable to take the case out of act 19 Geo. 2.

The following case, reported by the late Mr. J. *Park*, in his Treatise, is illustrative of the general proposition just laid down:—

It was the case of *Knox* v. *Wood*, (*a*) and was an insurance "on the ship *Friendship*, at and from *Bristol* to *St. Thomas's* and *Jamaica*, and from thence back to *Dublin*, on commissions valued at 1,000*l.*" The admitted facts were, that the plaintiff and one Alexander Robe, of *Bristol*, merchant, on the 26th *March*, 1807, entered into a charter-party for the voyage in question: that the said ship sailed from *Bristol* with a cargo for *St. Thomas's*, but which cargo was not the property of the plaintiff, nor insured by this policy: that the said ship delivered her cargo at *St. Thomas's*, and proceeded from thence in ballast to *Jamaica*, and was captured before her arrival and carried into *Cuba*, where she was ransomed by the captain, and again proceeded for and arrived at *Jamaica:* that the policy in question was meant and intended by the plaintiff as an insurance upon the commission expected to arise upon the sale and disposition by the plaintiff in *Dublin* of produce expected to be shipped on board the said ship at *Jamaica.* When the counsel for the plaintiff had opened this case, Lord *Ellenborough* said, "it is agreed that this insurance was on the commission of the homeward cargo; and it is also agreed that the vessel arrived at the place where that homeward cargo was to be shipped, and no reason is assigned why it was not shipped. No cargo appears to have been ready. *This is an insurance of *an expectation of an expectation.* [*49]

(*b*) 6 East, 316.
(*c*) *Ante*, p. 40.
(*a*) Mich. sit. at Guild. 1808. Park Ins. vol. 2, 564.

If Courts of Justice were to give effect to insurances of this kind, they had at once better repeal the statute against wager-policies. The plaintiff was nonsuited. A motion was, in the following Term, made to set aside the nonsuit, which was refused by the whole Court. (*a*)

A similar doctrine to the above was held in a late case of *Stockdale* v. *Dunlop*, in the Exchequer of Pleas, (*b*) in which Messrs. Harrison & Co., being the owners of two ships, called the *Antelope* and the *Maria*, trading to the coast of *Africa*, and which were expected to arrive at *Liverpool* with cargoes of palm-oil, agreed verbally with the assured to sell them two hundred tons of oil, "one hundred tons to arrive by the *Antelope* and one hundred by the *Maria*." The *Antelope* afterwards arrives with one hundred tons of oil on board, which were delivered to the plaintiffs. The *Maria*, having fifty tons, was lost "by the perils of the seas." The plaintiffs having insured the oil on board the *Maria*, together with their expected profits thereon, it was held that they had no insurable interest, because they had entered into no contract with the Messrs. Harrison & Co., which was capable of being enforced by law; Lord *Abinger* observing,—"The argument of the plaintiff's counsel rests upon an analogy drawn from the law relating to insurance on freight. It is very true where a party is entitled to the ship, either wholly or in part, the law will allow him to make a separate insurance on the freight. If thereby a charter-party and the ship is lost, he is entitled to recover for the freight. But if a ship be sent out for goods, and none are received on board, there is no interest to maintain an insurance on the profits. Where goods are received on board a vessel, and a contract is made to secure them, then if a loss happens the assured may recover, because his receipt of the goods has been prevented by the perils of the seas; for he has made a contract which he has great reason to expect will be performed. But cases of freight are not analogous to cases of insurance on [*50] the *profits to arise from the sale of goods, they stand upon the assumption that the assured has in his own power the subject-matter upon which the insurance is effected. If contracts for goods to be purchased in future were allowed to be insured, it would be allowing a wager-policy to be made. (*a*) But such a doctrine would defeat the Legislative enactment on the subject, and create an imaginary interest, which has no foundation in law. Here there was no written contract, or any contract which the plaintiffs could have enforced. The cases of freight suppose the contract capable of being enforced. Here no interest in goods passed to the plaintiffs. There is a contract to sell one hundred tons of palm-oil, to arrive by the *Maria:* if the vessel do not arrive, or the goods, the contract is void. Then where is the interest?"

In the case of *De Costa* v. *Firth*, (*b*) an insurance was made upon any of the packet-boats which should sail from *Lisbon* to *Falmouth*, or such other port as his Majesty should direct, for one year, from *October*, 1763, to *October*, 1764, upon any kinds of "goods and merchandises" whatsoever. And it was agreed that the goods and merchandises should be valued at the sum insured on such packet-boats, without further proof of interest than the policy, and to make no return of premium, for want of interest being on bullion or goods. The insured had an interest in bullion on the *Hanover* packet, being one of the king's packets between *Lisbon* and *Falmouth;* and it was totally lost within the time mentioned in the policy. The Court held that was a policy of a peculiar sort, and was an exception out of the 19 Geo. 2, c. 37. It is a mixed

---

(*a*) See Kent v. Bird, Cowper, 583. (*b*) 6 M. & W. 224.

(*a*) See the case of Knox v. Wood, *ante* p. 48, the transaction amounting in effect to an insurance on a void contract.

(*b*) 4 Burr. 1966, *ante* p. 22.

policy—partly a wager-policy, partly an open one; and it is a valued policy, and fairly so without fraud or misrepresentation. Therefore, the loss having happened, the insured is entitled as for a total loss.

Ninthly, we come now to another class of insurances under this head of profits, viz: those which arise upon a joint capture *of the army and the navy, before condemnation, to the officers and crews of the [*51] ships, who have an insurable interest by virtue of the Prize Act, which usually passes at the commencement of a war. This was held in the case of *Le Cras* v. *Hughes*. (*a*)

It was an action upon a policy of insurance of the ship *St. Domingo*, "at and from *Omoa* to *London*," upon which a case was reserved for the opinion of the Court. The facts of the case were these:—Captain Luttrell, commanding five of his Majesty's ships, and Captain Dalrymple, commanding a party of land forces, captured two *Spanish* register ships, lying under the protection of Fort *Omoa:* that the ship *St. Domingo* (on which the insurance was made) was one of the prizes, and was coming home, laden with the property then captured, upon which ship the defendant underwrote 500*l.*: and the ship was lost by perils of the sea. The question was, whether, by virtue of the Prize Act of 19 Geo. 3, c. 67, the officers and crews of the ships under Captain Luttrell, had such an insurable interest in the ship *St. Domingo* as to entitle them to recover.

Lord *Mansfield.*—"There are two questions in this cause; 1st, whether the sea officers had an insurable interest? This will depend upon the Prize Act and proclamation; 2nd, whether possession would entitle them to insure upon the *bare contingency* of a future grant from the Crown? As to the first, consider the act of Parliament which gives to all the people on board, that is, to the flag officers, commanders, and other officers, to the seamen, marines, on board every ship and vessel of war, the sole property of in all and every ship and vessel, which they shall take during the war after condemnation. Does the act say that the seamen *only* should take? Does it leave a joint capture by the army and navy undefined? Certainly not. Suppose, for instance, a case which I remember to have happened: a Dutch and English fleet combined, captured some ships: the English sailors could not take *solely;* nor could the act mean they should have *nothing. In the case in [*52] question, suppose Captain Dalrymple had given no assistance, is there any doubt that Captain Luttrell would have taken the whole? The only difference is, that he has not now the merit of a sole captor. The word soldiers in the proclamation, means soldiers on board the ship. Thus it stands on the act and proclamation. But supposing that doubtful, as far back as from Queen Anne's time down to the present, wherever a capture has been made by a King's ship or a privateer, the Crown has always given a grant of it after condemnation. There is no instance to the contrary. Is then the *contingency* of the ship's coming safe such an interest as the captor may insure? Insurance is a contract of indemnity, some interest is necessary, but not any particular form of interest—it does not depend upon a vested formal interest. The question is, whether this *contingency* is such a benefit to the assured as will make it a loss to him if the ship does not arrive? An insurance on the profits of a voyage was holden to be good. (*a*) An agent of prizes may insure the arrival of a ship which will produce him profit; for though he has not the possession of the property, he has an interest in the ship's coming safe as that he may insure. Here the possession is in the assured, and a certain expectation of

(*a*) B. R. East, 22 Geo. 3; Park Ins. 568; see also 1 B & P. 324.
(*a*) Grant v. Parkinson, *ante*, p. 38, 43.

receiving the property captured from the Crown, which gives him an interest in the arrival. It is not a *vested* interest, but such an expectation as never was defeated." Judgment for the plaintiff.

Lord *Eldon*, in the case of *Lucena* v. *Craufurd*, (*b*) speaking of the case of *Le Cras* v. *Hughes*, says, "If the *Omoa* case was decided upon the expectation of a grant from the Crown, I never can give my assent to such a doctrine; *that*, though founded upon the highest probability, was *not interest*, and it was equally not interest whatever might have been the chances in favour of the expectation. That which was wholly in the Crown, and which it was in the power of his Majesty to give or withhold, could not belong to the captors, so [*53] as to create any right in them." I have mentioned *this reported opinion of Lord *Eldon's*, on the decision of that *great master* of "insurance law," Lord C. J. *Mansfield:* at the same time I apprehend, that the opinion of a lawyer, even so great as *Eldon*, is not, upon such a question, to be mentioned after the opinion of Lord *Mansfield*, and that the decision of that great Judge in that case, is considered by the Courts, "Law," at the present time (which I shall presently show.) Lord *Eldon's* adoption and use of the term "chances," is not *fair* nor *correct*. Lord *Mansfield* calls "the expectation" a "certainty," there had been no instance to the contrary. Was not the certain expectation of the grant from the Crown (supposing the ship to have arrived safe,) greater than the expectation of the profit to arise from the sale of a cargo of *molasses*, belonging to a man who had a contract with government, and who, at the time of the insurance, could not have a perfect contract with regard to the sale, and that the government might have, at all hazards, disregarded their contract with him; might not the faith of the executive government have failed in that case, rather than in a case of such importance to the honour of the Crown, and to the welfare and success of the British navy? I will now refer to the judgment of Lord C. J. *Tindal*, whose legal reputation is inferior to neither of the two, upon this opinion of Lord *Eldon's* upon Lord *Mansfield's* decision. His Lordship, in delivering judgment in the case of *Devaux* v. *Steele*, (*a*) says, "this argument is founded upon the cases of *Grant* v. *Parkinson*, (*b*) *Le Cras* v. *Hughes*, and other cases of the same class, which were cited and relied on at the Bar. It is undoubtedly true that in the case of *Le Cras* v. *Hughes*, Lord *Mansfield* expressed a decided opinion, that the "expectations" of future benefit founded on the contingency of a future grant from the Crown, but warranted by universal practice, did amount to an 'insurable interest.' But after the observations of Lord *Eldon* on that case, in giving [*54] judgment in the House *of Lords, in the case of *Lucena* v. *Craufurd* (in error,) (*a*) and by *Ellenborough* in *Routh* v. *Thompson*, (*b*) the doctrine laid down in *Le Cras* v. *Hughes*, if still to be treated as a binding authority, must be considered incapable of being extended, and as confined to cases falling strictly within the same circumstances. The case, however, of *Le Cras* v. *Hughes*, did in its circumstances show "an expectation" approaching much nearer to a certain interest than the present. In that case it was stated by Lord *Mansfield*, "the Crown always makes the grant, and there is no instance to the contrary." We, therefore, observe that the decision of Lord *Mansfield* is upheld, as far as its circumstances appear, by the Court in the important and fully argued case of *Devaux* v. *Steele;* and, although it must be admitted that the authority of a lawyer like Lord *Eldon*, will always claim the respect of the profession of the law, and regard from the Judges, his

---

(*b*) 2 N. R. 323. (*a*) 8 Scott, 637; 6 B. N. C. 358.
(*b*) The molasses case, decided by Lord Mansfield.
(*a*) 2 N. R. 321. (*b*) 11 East, 434.

observations upon the case in question, do not seem to amount to much weight, particularly when considered in comparison with the opinion of the great Judge, who decided that case with the full approbation of the whole Court.

We go on now, after this digression, to pursue this subject farther, and to refer to some of the cases just mentioned, and which called into notice the principles laid down by Lord *Mansfield* in *Grant* v. *Parkinson*, and *Le Cras* v. *Hughes*.

The first case which is to be briefly mentioned, is a case which came on for argument before Lord *Kenyon*, and the rest of the Court of King's Bench. It was the more modern case of *Boehm* v. *Bell*, (c) in which it was held that the captors of ships seized by them as prize, have an insurable interest in them in the voyage home, for the purpose of bringing them to adjudication in the Admiralty: so that if the Court of Admiralty should not adjudge them as prize, and award restitution to the owners, the captors are not entitled to a return of premium.

Lord *Kenyon*, after argument, "observed that if it were a *legal [*55] capture the captors were entitled; if the capture was improperly made, they were liable to be called to account in the Court of Admiralty, where they might be amerced in damages and costs. They had therefore a right to insure against the decision, that might have loaded them with damages and costs. On this short ground I am of opinion, that the assured had an insurable interest, and there could be no return of premium. Mr. J. *Grose*.—"The whole difficulty has arisen from confounding an indefeasible interest with an insurable. It is not pretended that the assured had the absolute property in the subject of insurance; neither need they have such property to make the policy legal, it is sufficient if they had an insurable interest: and according to what was said by Lord *Mansfield* in *Le Cras* v. *Hughes*, they certainly had an insurable interest. If they had succeeded in the Court of Admiralty, it will be admitted that they had an insurable interest; and in case of their not succeeding, these were events for which they might be made answerable, and against which it was competent for them to insure." Mr. J. *Lawrence*, "the case turns on this short question, whether or not the assured had an interest which they might insure? Did they mean to game? or was there not a loss against which they might indemnify themselves by a policy? I don't mean a certain, but a possible loss. Now it has been shown that this was a case in which the Admiralty might have decreed costs and damages. That is sufficient. It might be asked, in the language of Lord *Mansfield* in *Le Cras* v. *Hughes*, had not the assured such an interest in the ship coming home, as to entitle them to an indemnity? I think they had, and therefore that the plaintiffs are not entitled to a return of premium."

So also the Commissioners appointed by the act of the 35 Geo. 3, c. 80, for the purpose of taking care of and disposing of Dutch ships and effects, detained in or brought into the ports of this kingdom, and who, by their commission are to manage, sell, and dispose of the same to the best advantage, according to the instructions they should from time to time receive from his Majesty and the Privy Council, contended *that they had an insurable interest in [*56] Dutch ships and effects, seized at sea by his Majesty's ships of war, that they might be brought into the ports of this kingdom, that they might insure in their own names; (a) and a count in a declaration on such a policy, stating the nature of their trust, and averring that they as such Commissioners, were interested in the ships and goods, and that the insurance was made for their use and benefit, and account as such Commissioners, was upon demurrer

(c) 8 T. R. 154.

(a) See *ante*, p. 7, 25.

holden to be good in the King's Bench. The Court considering them in the light of trustees, consignees, or agents, in either of which characters, it was conceived they had an insurable interest, *Craufurd* v. *Hunter*. (*b*) The case was three times argued in the Exchequer Chamber, (*c*) and the judgment of the Court of King's Bench was affirmed by Lord *Alvanley*, C. J., of Common Pleas, Lord C. B. *MacDonald*, *Heath*, Justices; *Hotham*, *Thompson*, and *Graham*, Barons, against the opinion of *Chambre*, J. A writ of error was afterwards brought upon this judgment in the House of Lords, and after much argument at the Bar, several questions were referred to the learned Judges, a majority of whom were for affirming the judgment of the Exchequer Chamber. But some doubts having arisen in the House of Lords as to the extent of damages which had been given, particularly by the Lord Chancellor, *Erskine*, and by Lords *Eldon* and *Ellenborough*. A *venire facias de nova* was awarded in July, 1806, which came on to be tried before Lord *Ellenborough*, at the Sit. after Mich. 1806. In the course of the discussion which had taken place, it was pretty generally understood that whatever difference of opinion there might be respecting the interest of the Commissioners, the House of Lords, and all the Judges were clearly of opinion, that his Majesty had undoubtedly an insurable interest in the ships and cargoes taken possession of under the authority of the statute; therefore the Attorney General, (*Gibbs*) and the late Mr. J. *Park*, who were counsel for the plaintiffs, thought it their duty to take verdicts on those counts, which *averred the interest in the King. Lord *Ellenborough* also directed the jury, that in his opinion his Majesty had a good insurable interest, upon which direction the underwriters, by their counsel, tendered his Lordship a bill of exceptions.

[*57]

The parties agreed to take the writ of error to the House of Lords, without going through the Exchequer Chamber, and at last on the 29th June, 1808, the House unanimously, with the concurrence of all the Judges, gave judgment for the assured, affirming the judgment of the King's Bench.

But it has been held that a statement in a case reserved that the insurance was on account of the captors, precluded the consideration whether a count in the declaration could be sustained, averring the interest to be in the Crown: and therefore in the case of *Routh* v. *Thompson*, (*a*) after a proclamation by the king in council, to detain and bring into port all *Danish* vessels, a hired armed ship took and carried into *Lisbon* a *Danish* vessel, and sold her cargo there, towards paying, in part, the expenses of necessary repairs, but without the authority of a Court of Admiralty, and afterwards took in a cargo on freight for *England* from *Lisbon*, on which day hostilities were declared against *Denmark*, by another proclamation of the king in council, after which an assurance was made on the ship and freight by order and on account of the captors: it was held that the captors had no insurable interest, as they could *claim* nothing, but only *ex gratia* of the Crown, the *Dane* having been seized before any declaration of war against *Denmark*, and the captors having no claim to prize under the Prize Acts. The action was tried before Lord *Ellenborough*, at *Guildhall*, in which the plaintiff took a verdict, subject to the opinion of the Court. The case was argued in Trin. Term, 1808. Lord C. J. *Ellenborough* said the case involved a question of considerable magnitude, and the Court would consider of it; and at the end of the Term his Lordship delivered their opinion. His Lordship said,—"In one count the interest is averred to be in his Majesty, and the insurance is stated to have been on his *account; and in another the interest is averred to be in the com-

[*58]

(*b*) 8 T. R. 13.
(*a*) 11 East, 428.
(*c*) 3 B. & P. 75.

mander, officers, and crew of the *Duchess of Bedford;* and the insurance is stated to have been on their account. The case expressly states, that the insurance was made on account of the captors; and that statement precludes us from considering it as made on account of the Crown. Had there been *no such specific statement*, it might have been open to us to consider, whether the policy were not referrable to the interest of the Crown; but after a distinct statement that the insurance was made (not on behalf the Crown, but) on account of the captors, it must be referred wholly to them; and the plaintiffs must recover or fail, as they have or have not a right to aver an interest in themselves. This brings us to the question, whether they had an insurable interest? Their right in this respect has been put upon two grounds: first, that they had a well-grounded expectation, warranted by the practice of the Crown in similar cases, that the ship and freight, had there been no loss, would have been granted to them; and secondly, that they had the lawful possession, and were liable either to the Crown or the foreign owner for the safe custody of the vessel: and that on either of these grounds they are warranted in insuring on their own account. As to the first, it is material to see in what situation the captors stood: it is clear they had no vested right; they could demand nothing from the Crown. Had the Crown made the grant in their favour, it would have been altogether, *ex gratiâ*, a mere boon and gift. That gift might have been of the whole, or it might have been of part, and of a very inconsiderable part only. The bounty of the Crown would probably have been proportional to the merit of the capture, detention, and value of the prize. Had any considerable danger attended the performance of these services, the grant would probably have extended to the whole; had there been no danger or difficulty, the grant would have probably been smaller; and had it appeared that the seizure had been made upon speculation only, without any knowledge of the proclamation, there would probably have been no grant at all. At any rate, if there were a grant, it would be mere bounty; *and has a man a right to indemnity because he has lost the chance of receiving a gift? Had the ship [*59] arrived in safety, the captors would have had the chance of a grant from the Crown; but can they, in respect of that *chance*, insure the ship's arrival? To what extent could they insure? Not to the whole, because the grant might have been of a part; nor to any given part, because it must have been uncertain what part, if any, would have been granted. The utmost extent is the value of the chance; and how is that to be estimated? Independently of the difficulty of fixing the value, and supposing such a chance insurable, must not the interest be so described in the policy?—(or a man, who has no right, legal or equitable, either in ship or freight, might effect an insurance on either, merely because he has a chance some collateral benefit may come to him if the ship and cargo should arrive in safety.) The declaration must aver an interest in the subject insured, and that interest must be proved; and how can it be said that these captors have any interest when the ship is altogether the king's—the freight is altogether the king's? And the captors have no interest in either, nor other concern in respect to the same, beyond a mere chance that the king may be induced to give them something out of the produce of the ship and freight. As to the second count, that the captors had the lawful possession, and were responsible either to the Crown or to the *Danish* owners for the safe custody of the vessel, is this a true representation of their situation? They certainly had the lawful possession, but were they responsible for the ship's safety, unless as far as that safety might be endangered by any wrongful acts of their own? The seizure was warranted by the king's proclamation: that made their possession lawful. The subsequent declaration of hostilities put an end to any claim by the *Danish* owners, and, of course, to all responsibility of the captors as to them. It then became their duty to act for the best, with a view to the

safety of the ship, and the mere interest of the Crown therein. They were bound to leave *Lisbon;* it was for the interest of the Crown that they should [*60] make the ship instrumental in withdrawing from *Lisbon* as much property *as she could possibly carry with propriety. They acted for the best, and were consequently justified in respect to the Crown in what they did. The Crown cannot call upon them for damages; and they have no right to ask for a sum as an indemnity, when they have not been, and (under the circumstances stated) could not have been damnified. The consequence is, that the plaintiff has no right to recover upon the policy. The question then arises, whether he has any right to recover his premium? And, as there was no fraud in the captors, in effecting this policy: as there was no illegality in the voyage or insurance: and as the resistance of the underwriters to the claim, upon the ground that there was no risk: the plaintiff is entitled to his premium, and the verdict should be entered accordingly."

Subsequently to the above action, another action on the same facts was brought by the plaintiff against the defendant, who has subscribed for 300*l.* The action was commenced on the 21st *June*, 1810, upon insurance made by him in his firm of P. & H. Le Mesurier & Co., dated 12th *November*, 1807, upon the ship *Knud Terkelson*, valued at 3500*l.*, and on freight not valued, "at and from *Lisbon* to *London.*" The interest was averred to be in his Majesty, and the loss to be by perils of the sea. The defendant pleaded the general issue; and at the trial, before Lord *Ellenborough*, at the Sit. after Trin. Term, 1800, at *Guildhall*, a verdict was found for the plaintiff, subject to the opinion of the Court upon a special case. The argument on the case was heard in Hill. Term, 1811.

Lord *Ellenborough*, C. J.—"The points made for our consideration are, first, whether the king had an insurable interest, supposing him to have been apprised of his right at the time when the insurance was made, and had determined to insure it; and next, whether he could adopt it after it was made. The facts are that, after a proclamation by the king in council for the detention of *Danish* vessels, an armed ship, in the service of his Majesty, took possession of the *Danish* ship in question. Was it taken on behalf of the king? It [*61] was taken by his servants, in an armed brig engaged in his *service; and, if not taken piratically, must have been taken for him. The king, therefore, had possession of the *Danish* ship; for as between his Majesty and those who were acting on his behalf and under his authority, and who were accountable to him if they damaged or embezzled the property, their possession was for this purpose his possession. Then had the king a lawful possession? Was it ever made a question whether the king were a wrong-doer in seizing the vessels of a foreign nation? If, then, his Majesty had a lawful possession, may he not insure the property against loss? He was legally competent to do so, though not in the practice of insuring his own ships of war. But, it may be said, that he knew nothing at the time of insurance. It was made, however, by the orders of his officers, whose duty it was to take care of the property, and who were responsible to him for it. Then may he not adopt the act? The insurance is not, indeed, made in terms in the king's name, but it was by the direction of Sampson, who had been made agent by the captors for the prize. But the captors had no interest of their own in it, and therefore, for their own benefit, they were not competent to appoint an agent; they must therefore be taken to have appointed him as agent on the part of the Crown, whose servants and agents they were. Then Sampson writes the letter authorizing the insurance being made, and therein he desires insurance to be made "for my account." That, certainly, was not intended as a direction to insure his own individual interest, but merely credit was to be given to him for the premiums; and he proceeds to state that the insurance is to be

made of the *Danish* vessel, *Knud Terkelson*, which had been detained by his Majesty's armed ship, *Duchess of Bedford*, and for which he was authorized to act as agent. There was no communication of the names of the particular persons for whose benefit the insurance was to be made, nor was it necessary that the agent should then know who they were; but it was to be effected in the name of the agent, for the benefit of those who should be concerned in interest: and the underwriters bound themselves to indemnify those [*62] *who should appear to be interested in the prize, in case of loss; it must, therefore, enure for the benefit of the Crown, which alone had any interest in the captured vessel. The Crown, then, having an insurable right, afterwards adopt this act of its servants and agents. And if the policy were made for the benefit of those concerned, and the Crown were concerned in interest, there can be no doubt it may adopt the act; and it has adopted it. The case of *Craufurd* v. *Lucena* is full in point to this. The *Dutch* Commissioners were strangers to the property before it came within the ports of this kingdom, though connected with it in trust when it was brought there; but the Crown afterwards adopted the insurance, and the House of Lords held that to be a valid adoption, as well in respect of the ships taken before as afterwards. (*a*) Here, then, there was an adoption by the Crown of the act by which the property was acquired; and there was also an adoption of the insurance made afterwards to protect it. By the adoption of the act of taking possession, there was an insurable interest in the king; and the adoption of the insurance gave him also an interest in the policy. The facts, therefore, being expressly stated from whence this conclusion may be drawn, and which it was left to us by the statement of the case, there is no occasion to send the question again to a jury." *Routh* v. *Thompson*. (*b*)

The principle of law decided in the above case was recognized likewise in a more modern case of *Hagedorn* v. *Oliverson*. (*c*) In which it was decided that where the plaintiff made an insurance (*d*) on "ship" as well in his own name as, for, and in the name of all and every other person, &c., in the usual form, for the benefit of one F. S. Schroeder, an alien enemy, and procured a license to legalize the voyage, and a loss happened, and two years afterwards, Schroeder, by letter *to the plaintiff, adopted the insurance, the [*63] plaintiff might recover against the underwriter, averring the interest in Schroeder. (*a*) The plaintiff had a verdict before Lord *Ellenborough* at Guildhall, subject to the opinion of the Court.

After argument in Easter Term, 1814, Lord *Ellenborough*, C. J., said—"The plaintiff had a right to make an insurance, on the chance of its being adopted for the benefit of all those to whom it might appertain, which are the words of the policy. He might insure for those who were actually interested, and possibly who might be interested. Schroeder was interested, and might become privy to this insurance by subsequent adoption, according to *Lucena* v. *Craufurd*, and *Routh* v. *Thompson*. He has adopted it, and now it is made a question, whether he can become privy to the benefit of it. It appears to me, upon those authorities he may make use of the name of the person at the head of the policy, as the person who had given the order to effect the insurance, which will satisfy the stat. 28 Geo. 3, c. 56. (*b*) It seems to me that

---

(*a*) See *ante*, p. 7, and see by Lord Ellenborough himself, Lucena v. Craufurd, 1 Taunt. 385.

(*b*) 13 East, 274. (*c*) 2 M. & S. 485.

(*d*) It was stated upon the argument that the plaintiff gave the order to the broker to make the insurance.

(*a*) See 1 M. & S. 566, where it appears that Schroeder was interested in part of the ship. (*b*) See *ante*, p. 3.

this action is maintainable for the benefit of Schroeder, who was interested at the time, and has become privy by adoption."

The next case which, from its importance with respect to the law of insurances on "prizes," deserves mentioning, is the case of *Stirling and others* v. *Vaughan*. (*c*) This was an action on a policy of insurance effected by the plaintiffs as agents, upon a ship called *The Prize*, No. 3, and her cargo, "from *Monte Video* to *London*." The subject of insurance was a prize taken from the Spaniards, by the conjoint forces of the army and navy upon the expedition to the river Plata: the interest was averred in the first count to be in the king; by the second to be in the captors; there was a third count, not necessary to mention. The loss was alleged to be by perils of the sea, on the voyage home. At the trial before Lord *Ellenborough* at Guildhall, Admiral

[*64] Murray was called *as a witness, to show on whose account the insurance had been effected: and he deposed, that after the capture of this and other prizes by the conjoint forces employed on the expedition, a Mr. Blacker was appointed prize agent for ships, by the naval and military commanders, to act on behalf of all interested in the capture; and from him orders were received at home, to insure everything in which the captors were interested: but it did not appear that Blacker had received any appointment or direction from the Treasury, or any other department of government authorizing him specially to insure or take of the interests of the Crown, further than such an authority might by law be inferred from his appointment as prize agent by the captors, and the directions received by him from them, to act on behalf of all interested in the capture. Neither was there any evidence of the king's having repudiated such an authority. The prize was lost by the perils of the sea on the homeward voyage, and before any condemnation of her in the Court of Admiralty. Under these circumstances, Lord *Ellenborough*, C. J., left it to the jury, to infer an authority from the Crown to the captors, to cause insurance to be made, or an adoption of it when made on behalf of its interest in the prize, in which the captors themselves had at least an eventual interest: and, considering that the plaintiffs were entitled to recover either on the first or second count; though he relied at the time principally on the former; his Lordship advised the jury to find a verdict for the plaintiffs, which they did accordingly. A new trial was moved in Mich. Term, 1809. During the argument, the following observations fell from the Lord Chief Justice.

Lord *Ellenborough*.—The law will presume, if nothing appear to the contrary, that every person accepts that which is for their benefit. And, here, it is for the benefit of the Crown to preserve the prize, if it were only for the purpose of securing to the captors the reward which its bounty had provided for them in the event of condemnation. Besides, the *de facto* captors have a

[*65] special property in the thing *captured, founded upon a lawful possession, which they hold for those who are ultimately found to be interested in it: and unless it be shown to be a mere tortious capture, it must be taken to be a lawful capture and possession by them. That view of the subject relieves it from all questions, whether a mere expectation of a subsequent grant from the Crown be insurable, as an interest in the subject-matter. After argument at the Bar, the Court at once pronounced judgment.

Lord *Ellenborough*, C. J.—"A general verdict has been given for the plaintiffs in this case upon the declaration, which contains three different averments of interest in different counts (the third being out of the question)—the first averring the interest in the king—the second in the captors. The verdict must be sustained, if at all, either upon the first or second count. The sub-

(*c*) 11 East, 618.

ject-matter of the insurance was a prize, taken by the army and navy conjointly; and the words in which the authority is stated to have been given to Blacker to insure, were, that he was appointed prize agent for the ships, by the naval and military commanders, to act on behalf of all interested in the capture; and under that authority he directed the insurance in question to be made. The inclination of my mind at the trial was, that this might be considered as a special authority, to act on behalf of the king as well as the immediate captors; but I would not rely altogether on that, when, according to the more obvious and probable meaning of the words, the authority was meant to be given for the benefit of the captors, under the appropriation of the Crown, by virtue of the Prize Act of 45 Geo. 3. That brings it to the question of interest in the captors under that statute; whether before condemnation they have such a vested interest in the subject-matter, as is by law capable of being insured? And, therefore, my opinion will not clash with any opinion delivered in any other case, nor with the letter or spirit of the stat. 19 Geo. 2, c. 37, against gambling or wagering policies. But, though the verdict could be sustainable upon this short ground, yet I wish to consider the case more at large. For all valuable purposes, the captors, as such, must be taken *to represent the Crown: and, in the case of *Lucena* v. *Craufurd*, it was considered by the same noble and learned person, (*a*) whose opinion has been adverted to, that the king has an insurable interest in a prize before condemnation; and yet, that till condemnation there remains something wanting, the vesting of the full property in the Crown, (*b*) and to enable the Crown to grant it to others, as against the original owners. It is the sentence of a Court of Admiralty, upon the question of prize, which concludes the question of property against the original owners, according to the case of *Hughes* v. *Cornelius*. (*c*) Then by the act of 45 Geo. 3, the Crown gives up its right in the prize to the captors, subject, however, as before, to the final adjudication of the property, as prize, by the Court of Admiralty. But it is said that the Crown may still release the prize to the captured before condemnation, and therefore the captors cannot have an insurable interest in the property. But that right of the Crown trenches no more upon the insurable interests of the captors under the statute, than upon that of the king himself. It is then objected that the property in the prize may never become vested in the captors, It is vested, however, as far as the Crown has any right to vest it, defeasible no doubt, by an adjudication of the Court of Admiralty against the captors, to restore the prize to the former owners: but it is not in common experience that a defeasible right is insurable? It is the case of consignees of goods under a bill of lading: the goods on their passage home are liable to be stopped *in transitu*, and his interest defeated: yet can it be said that the property is not so far vested in the consignee, as to entitle him to insure? The indefeasibility of the property, therefore, is not the criterion of an insurable interest. Again, what is the case of an executor? Probate is necessary to complete his title: yet before probate, he has title sufficient to insure. The captors have the actual possession of the subject-matter of insurance by the grant of the king, *the only person in the kingdom who could contest the title with them. They have the possession, with a partial right of disposing of the thing immediately, liable indeed to have their right devested by a sentence of restoration. But what difference is there between the right of the captors and of the Crown in these respects? The assignees of the Crown, as they may be styled, must stand in the same situation in this respect as the Crown itself.

[*66]

[*67]

(*a*) Lord Eldon, 2 New Rep. 323. (*b*) See ib.
(*c*) 2 Show, 232, Sir T. Raymond, 473; and Skin. 59.

This is not like insuring a mere expectation, nor like the case of the Dutch Commissioners, who had no interest in the ships insured, till they arrived within the ports of the realm. But these captors had a present possession, and a right to maintain trespass against any person attempting to take the prize from them. Even with respect to captors in general; supposing the prize not to have been acquired tortiously, but *jure belli*, I should think that in respect of their lawful possession and special property they might insure: but it is not necessary in this case to decide that general point; they had not only a right of possession, but a right of property as far as the Crown had the power of granting it, liable only to be dispossessed by the release of the Crown, or by a sentence of restoration." The other Judges concurred in this judgment, and the rule was discharged.

In a recent case of *Devaux* v. *Steele*, (*a*) the principles of law laid down in the cases of *Grant* v. *Parkinson*, (*b*) *Le Cras* v. *Hughes*, (*c*) and *Routh* v. *Thompson*, (*d*) came under the consideration of the Court of Common Pleas. This was an action brought upon a policy of assurance, which stated the assurance to be made to the amount of 800*l.* on bounty, "allowed by the French government, on the tonnage ship *Le Henri*, agreed to be valued at 800*l.* The declaration alleged that the said bounty would have been allowed by the French government, if the ship, with the cargo on board, had arrived in France: and stated a total loss by the perils of the sea. By a law of France relating to the [*68] whale fishery, it is provided, *"that the vessel which shall have fished in either the Pacific Ocean, by doubling Cape Horn, or by passing through the straits of Magellan, or to the south of Cape Horn, at sixty-two degrees of latitude at least, shall obtain on its return a supplemental bounty, if it brings back in the produce of its fishery, one-half at least of its burthen, or can prove a navigation of sixteen months at least." Held, that supposing the bounty not to be payable as a matter of right under the strict interpretation of the law; that the chance of receiving this bounty on her return, founded upon an alleged invariable course of practice of the French government in its administration, did not constitute an insurable interest. Lord Chief Justice *Tindal*, at the close of his judgment, says—"It would be impossible, as it appears to us, to hold this to amount to proof, that from the time of granting the bounty there has been a uniform practice of allowing the bounty under the circumstances stated in the case; and unless such evidence is produced, the case does not fall within the rule laid down in *Le Cras* v. *Hughes*, and the plaintiffs cannot be held to have taken an insurable interest in the bounty."

Tenthly, a consignee of goods has an insurable interest. In a case in the Common Pleas of *Hill and another* v. *Secretan*, (*a*) where a house in Spain, who were indebted to the plaintiffs, consigned goods to Messrs. Dubois, and indorsed a bill of lading, with a letter annexed, directing them to hold a part of the said cargo for the use of the plaintiffs, who, upon getting such intelligence, made the insurance in question, being creditors of the house in Spain, though they had given orders for the goods; the Court held that the plaintiffs being creditors of the house in Spain, raised a good consideration for the assignment; and, that therefore, there could be no doubt that the plaintiffs had a good insurable interest.

And where goods were consigned from Birmingham to Naples, under an [*69] order to despatch certain goods, (on an insurance being made) it was held that the consignee might *support an action for the injury

(*a*) 8 Scott, 637; 6 B. N. C. 358 (*b*) *Ante*, pp. 38, 43, 53.
(*c*) *Ante*, pp. 18, 51. (*d*) *Ante*, pp. 57, 62.
(*a*) 1 B. & P. 315, and Wolff v. Horncastle, 1 B. & P. 316.

which they sustained in the course of their conveyance to Naples. The Court held that the property in the goods vested in the purchaser, as soon as they were despatched from Birmingham, and that the intention of the party was strongly evidenced by the order for insurance, which had been given on the part of the consignee; the consignee could not have sued upon that insurance, unless he had had an interest, nor could the consignor sue upon it as had been declared by the consignee. *Fragano* v. *Long*. (*a*)

And in the case of *Neale* v. *Reid*, (*b*) where it was agreed between the vendor and the purchaser of goods that the goods should be shipped under the care of an agent, appointed by both parties, for the vendor's security; and the purchaser, who had drawn bills on his correspondent for the payment of the purchase, directed his correspondent to insure the goods to a certain amount, it was held that the insurance, which was made according to the purchaser's direction, and not in pursuance with an agreement with the vendor, was not liable to the claim of the vendor for a part of the purchase, and that the purchaser's agent was justified in paying the proceeds of the policy to him. There was no intimation that any person was concerned with him in the policy, nor did it give the purchaser's correspondent any authority to apply the proceeds of the policy to the vendor's benefit. Mr. Justice *Holroyd* observed, "that the goods were shipped at the risk of the agent, and if they had been lost on the voyage the loss would have fallen upon him. Being under a liability for the goods, if lost, he insured to a large amount at his own expense; he had made no bargain to insure, but, whether insured or not, was compellable to pay the bills, and therefore provided a substitute for the cargo to indemnify himself in case of a loss; but the sum insured was not subject to the same liabilities as the cargo."

It is to be observed, that, if at the time of making *insurance [*70] the assured has an insurable interest in the property, it is immaterial that the property may have afterwards passed to another party; for the change of property can have no effect in relieving the underwriters from their liability, as the assured can sue on the policy for the benefit of the party to whom the property has passed.

Thus in the case of *Sparkes* v. *Marshall*, (*a*) where Mr. Bamford, who was a corn-dealer, at Southampton, sold to the assured from five hundred to seven hundred barrels of oats, to be delivered at *Portsmouth*, to be shipped by Thomas John and Son, merchants, at *Youghall*, from *Youghall;* and four days afterwards Bamford advised the assured that Thomas John and Son had engaged room in the packet to take about six hundred barrels of oats on the assured's account; and on the following day the assured made an insurance on the oats, *per* packet, to the amount of 400*l.*; and the oats were shipped, but the packet being bound for *Southampton*, and refusing to stop at *Portsmouth*, Bamford sold the oats again, and delivered the bill of sale to another party at *Southampton;* and the plaintiff, after the loss, vested his interest, by indorsement, in Bamford, for a consideration: it was held that, as the assured had a right to bind Bamford to his bargain, and call upon him either to procure the packet to bring the oats on to *Portsmouth*, or forward them by another vessel, he had a legal interest in the specific oats, and might insure it; and there was no assent on the part of the plaintiff to vary his right or claim to those particular oats till the insurance was made and the loss known; and that there was no principle of law on which a change in interest after the insurance had been

---

(*a*) 4 B. & C. 219. (*b*) 1 B. & C. 657.

(*a*) 3 Scott, 172; 2 B. N. C. 761; see Sutherland v. Pratt, 11 M. & W. 296. *Ante*, p. 12.

made, much less after the loss had happened, which could be set up by the underwriters against a claim for such a loss.

But in another modern case of *Clay* v. *Harrison*, (*b*) where the assured, in *England*, contracted with Messrs. Hubbard and Co., at *St. Petersburgh*, to send him a cargo *of deals, to be paid for by a bill at three months, which he duly accepted. The deals were shipped, and the insurance made. The ship was stranded on the voyage, near *Elsineur*, and the deals saved, but so much damaged as not to be worth sending for. The assured, on hearing of the accident, gave the underwriters notice of abandonment the day before the bill became due. The assured having become bankrupt, Hubbard and Co. wrote to their agents at *Elsineur* to take possession of the goods as their property; it was held that the assurer's assignee, under a commission of bankruptcy, could not recover on the insurance, inasmuch as the stoppage *in transitu* revested the property, and the assured had no longer an insurable interest. Lord *Tenterden*, observing that the question was, whether the bankrupt had an interest in the goods insured at the time of the loss, and that depended upon the effect to be given to the stoppage *in transitu*, "we are of opinion that, under the peculiar circumstances of this case, the bankrupt, after the stoppage *in transitu*, had no property, and that therefore the action cannot be supported."

[*71]

In the case, also, of *Wolff and another* v. *Horncastle*, (*a*) which was fully treated of in a former section, (*b*) it was held that where a merchant had consigned a cargo to a company in *London*, and drawn bills for the amount, but transmitted the bills of lading through the plaintiffs, his general agents, to be sent to the company that they might insure, and he, at the same time, drew on them for 300*l*., which bills were accepted and paid; but the company refused to accept or draw on them, or take the cargo, or to insure, upon which the plaintiffs made the insurance in their own name, and informed the consignor, who approved thereof, the plaintiffs were to be considered as consignees of the whole, and had a right in that character to insure for the benefit of their consignor, and that they had a clear insurable interest in themselves to the amount of 300*l*.

*In the case of *Smith* v. *Lascelles*, (*a*) it was decided that, if a merchant abroad, who is interested in goods and the freight of the cargo, mortgage them to his creditor here for payment of money at a certain day, and by letter inclosing the bills of lading, and at the same time give directions to him to make an insurance, the latter will be liable to an action for not insuring, notwithstanding the mortgage was absolute before the letter was received.

[*72]

In the foregoing cases it has been seen how strictly the Courts have construed that part of the act of 19 Geo. 2, c. 37, which prohibits any person making an insurance who has not got an interest in that which is the object of the insurance; and whenever they have seen on the face of the policy, that there is, in fact, no fair contract of indemnity between the parties, but only a gaming transaction, they have never hesitated to declare that policy void by the statute.

The case of *Lowry and another* v. *Bourdieu* (*b*) is an instance of the above observation.

The plaintiffs had lent to Lawson, captain of the *Lord Holland*, East Indiaman, 26,000*l*., for which he had given them a common bond in the penal sum

---

(*b*) 10 B. & C. 99.
(*a*) 1 B. & P. 316; and see Robertson and others v. Hamilton, 14 East, 522.
(*b*) Sect. 1, *ante*, p. 4. (*a*) 2 T. R. 187.
(*b*) Doug. 468.

of 52,000*l.* While he was with his ship at China, the plaintiffs got a policy of insurance underwritten by the defendant and others, which was in the following terms:—"At and from *China* to *London*, beginning the adventure upon the goods from the loading thereof on board the said ship, from and immediately following her arrival in *China*, valued at 26,000*l.*, being the amount of Captain Patrick Lawson's common bond, payable to the parties, as shall be described at the back of this policy; and it bears date, 16th day of December, 1775; and in case of loss, no other proof of interest to be required than the exhibition of the said bond: warranted free from average, and without benefit of salvage to the insurer." At the head of the subscription was written,—"On a bond," as above expressed. Captain Lawson sailed from *China*, and arrived safe with his *privilege (as it is called) or adventure in *London*, 1st *July*, 1777, none of the events insured against having happened. The [*73] receipt of the premium was acknowledged at the back of the policy. This case came before the Court, upon an action for a return of premium, on the ground that the policy being without interest, the contract was void. At the trial, which came on at the Sit. after Trin. Term, 1780, the Chief Justice was of opinion that this was a gaming policy prohibited by the statute 19 Geo. 2, c. 37, and a verdict was given for the defendant. A motion for a new trial was afterwards made, when the majority of the Judges confirmed Lord *Mansfield's* opinion. Mr. Justice *Willis* differed from his brethren: the learned Judge being of opinion that it was not a gaming policy: that it did not appear to him that the parties had any idea they were entering into an illegal contract; that the whole was disclosed, and they thought there was an interest: this was a mistake, but it is a new point of law.

Lord *Mansfield.*—"It is certainly true, in many instances, that first thoughts are best. I am now very much inclined to my first opinion. There are two sorts of policies of insurance: mercantile and gaming policies. The first sorts are contracts of indemnity, and of indemnity only; and from that principle a great variety of decisions and consequences have followed. The second sort may be in the same form, but in them there is no contract of indemnity, because there is no interest upon which a loss can accrue. They are merely games of hazard, like the cast of a die. In the present case the nature of the insurance is known to both parties. The plaintiffs say, 'We mean to game, but we give our reason for it: Captain Lawson owes us a sum of money, and we want to be secure, in case he should not be in a situation to pay us.' It was a hedge; but they had no interest; for if the ship had been lost, and the underwriters had paid, still the plaintiffs would have been entitled to recover the amount of the bond from Lawson. This, then, is a gaming policy, and against an act of Parliament."

*In *Puller* v. *Glover*, (*a*) it was held *not* to be a gaming policy for a person who had chartered goods to *St. Petersburgh* to make [*74] the underwriters agree to pay a total loss, in case the ship should not be allowed by the *Russian* Government to discharge her cargo at *St. Petersburgh;* and the assured were allowed to recover, on an allegation that the vessel had not been allowed to discharge her cargo, but was obliged to return, by which the value was reduced below the invoice price, together with the charges thereon, and the premium of insurance, &c. 1st, it was held not to be a gaming policy; 2ndly, it is an insurance upon the goods, and not on the voyage; and 3rdly, the agreement allows the non-admission of the goods to be a loss.

Where, by the express terms of a charter-party, the owner of the ship stipulates with the freighter that part of the freight shall be payable beforehand, inas-

(*a*) 12 East, 124.

much as the freighter would lose the money so advanced by him, unless the ship and cargo arrived safe, he therefore has an interest in insuring that event to the amount of the sum he has advanced. (*b*) It is undoubtedly competent to the owner to make such a stipulation; but, if he does, it is his duty to take care that it is inserted in clear and explicit language in the charter-party that the money advanced shall be advanced in *part payment* of the freight. (*c*) But if it be merely an agreement between the parties, which is a very usual occurrence, that the freighter should make an advance to the master for the use of the ship, this is not to be considered as a part, in the absence of express terms in the charter-party to that effect, but it amounts only to a loan on the part of the freighter to the owner of the ship, and consequently the former has no insurable interest in the money advanced.

This was decided in the case of *Mansfield* v. *Maitland*, (*d*) which was an action on a policy of insurance on "ship and goods," from *Quebec* to *London*.

[*75] By a memorandum, drawn *at the foot of the policy, the insurance was declared to be on a bill of exchange for 219*l.*, drawn by the master on the plaintiffs, at *Quebec*. At the trial, before *Abbott*, C. J., at *Guildhall*, it appeared that, by a memorandum of charter-party between the owners and the plaintiffs, the ship was to proceed from *London* to *Quebec*, and there take in her cargo, one-half of the freight to be paid on unloading and right delivery of the cargo, and the remainder by bill, on *London*, at four months' date; the captain to be supplied with cash for the ship's use. In pursuance of this last stipulation, the master drew the bill of exchange in question for 219*l.*, value received, for the ship's use, on the plaintiffs, which was duly accepted, and paid. The ship was lost on the homeward voyage. The Lord Chief Justice was of opinion that the plaintiffs had no insurable interest, and directed a nonsuit; and *Bayley*, J., said,—"If the memorandum of charter-party had clearly expressed that the money advanced should be in part payment of the freight, then it would follow that the loss of the ship would occasion the loss of the money advanced by the freighter, and he would have had an insurable interest in it. But if that is not so, and it be only a loan by the freighter, he would have no insurable interest, having a remedy against the owner for the debt. Now, if it had been the intention of the parties it should be a part payment of the freight, one would naturally have expected that the memorandum of charter-party would have been differently worded. The stipulation is, that one-half of the freight is to be paid in cash on unloading, and the remainder by bill, in *London*. Now, instead of this, there would have been added, 'deducting premium advanced,' if such deduction was intended to be made. It seems to me, therefore, that, in the absence of any such stipulation, this money was to be advanced as a loan by the freighter, which he might, in case freight was earned, deduct from the freight, but for which, if no freight were earned, he had still his remedy, even against the owner; and, in that case, it is admitted that he had no insurable interest."

[*76] *In the case of *Tusker* v. *Scott*, (*a*) which was an action for money paid for the use of the defendant, who was the master of a ship, called the *Ocean*, who drew, in *Canada*, a bill on his owners here, in favour of T. Gaudie, for 1990*l.*, for supplies for the ship's use, and wrote on the bill, "If be not honoured, the holder will insure the amount, and place the premium, &c., to the drawer's account and the ship's account," J. Scott. The bill being dishonoured, the holder insured the ship for *three* months, and the

(*b*) See De Silvale v. Kendal, 4 M. & S. 37.
(*c*) Per Lord Tenterden, 4 B. & A. 585. (*d*) 4 B. & A. 582.
(*a*) 6 Taunt. 234.

interest was declared to be "on the interest in a bill of exchange, drawn by the defendant, on Mr. Bowfield, in favour of T. Goudie, dated *Quebec*, 10th *June*, 1814, being for value received, for the use of the said ship; and it was agreed that, in the event of loss, the bill should be considered as sufficient proof of interest, and payment made accordingly." The drawee, receiving advices from the drawer, paid the bill, after the insurance had been effected, but refused to pay the charge of insurance. The ship was lost after the expiration of the three months. At the trial, at *Guildhall*, Sit. after Easter Term, the counsel for the defendant made four objections to the plaintiff's recovering. *Gibbs*, C. J., overruled them; and the jury found a verdict for the plaintiffs. On the motion for a new trial, the counsel for the defendant moved on *two* only of the objections made at the trial. First, the insurance was illegal; (*b*) secondly, he urged that, if the holder was authorized to effect an insurance, it was his duty to effect a policy for the voyage, so that the owners might have the benefit of it, in case the ship was lost.

Gibbs, C. J.—"There is nothing in either of these objections. A discretion was given to the holder of the bill to insure for his own benefit, and he was to insure according to that discretion as he chose to exercise it; and he has exercised it prudently. As to the other objection—on the illegality of the insurance—I desire the doctrine I lay down may be confined to this particular case: I think the plaintiffs *were entitled to pay the money they paid for the use of the master; this, too, would be clearly an available security in all cases, except the case of a *British* ship, and it is not in proof that the plaintiffs knew, nor was it incumbent on them to inquire, whether this was a *British* ship or not." [*77]

The Court refused the rule on all the grounds.

A question, bearing much upon the subject of our present consideration, was decided in a very recent case (in the Court of King's Bench) of *Winter* v. *Haldimand*. (*a*) The matter came before the Court on a motion to set aside an award, and the question was, whether the underwriters, upon a policy of insurance "on merchandises," could be made liable for certain charges and expenses incurred at the port of the ship's loading, considered as additional value imparted to the goods? The facts were the following:—The assured hired a vessel, on a voyage from *Buenos Ayres* to *Canton* and back; they were to pay 10,000 dollars for the use of it, in this manner, viz: all the expenses that might be necessary at *Canton* for the port-charges, and 2000 dollars for other incidental expenses, and the remainder at the vessel's return to *Buenos Ayres*. The underwriters had no notice of the agreement. It was held that the assured, on a policy on "merchandise," could not recover the sums of money paid at *Canton*, as part of the value of his goods. After the argument at the Bar, the Court took time to consider their judgment, which was afterwards delivered by Lord *Tenterden*, C. J.—"In the argument at the Bar, on behalf of the plaintiffs, reference was made to the principal foundation of all insurance, viz: indemnity; and, it was contended, to effect that object, and bring the case within the principle, the payment at *Canton* must be considered as part of the value of the goods shipped at that place, and it was observed that the charges of shipping and the premium of insurance, are, even in open policies, considered as part of the value of the goods; and further, the freight also, if paid in advance, was in practice considered as part of their value on a total loss. This latter assertion was denied by the defendant's counsel to be true; and the *Court has no means of knowing how the practice is, nor [*78]

(*b*) Citing Kulen Kemp v. Vine, 1 T. R. 304.
(*a*) 2 B. & Ad. 649.

is the ascertainment of the practice material in our view of the case. No case like the present has been found in our books, nothing of the kind was quoted from foreign authors, and, as far as my knowledge of them extends, nothing favourable to the plaintiff can be found in them. We must therefore look at the *terms of the policy*, which is the contract in question, and whether its terms, construed according to any principle recognized by usage in this country, will authorize the plaintiff to charge the defendant with those payments at *Canton*, as part of the value of the merchandise shipped there: there is no other mode in which the defendant can be made answerable for them on this policy, though we have no doubt that those payments might have been made the subject of a special and distinct insurance. It is found that the underwriters had no notice of the terms of the charter-party, and therefore they could not know whether the parties interested would have engaged, as they have done, to treat the payments to be made at *Canton*, as part of what is called freight, so that the loss thereof would fall upon them, if the goods were lost; or whether the owners of the ship were to find the means of making those payments on their account. And it appears to us to be unreasonable to make the extent of the responsibility of the underwriters depend upon the private contract of the parties interested, and not upon the general usage and custom of trade. The sum of 10,000 dollars is not properly to be called freight, but is the price of the hire of the ship, and would have been payable if the whole 48,000 dollars had been left or otherwise disposed of at *Canton*, and the ship had returned in ballast, or with passengers, instead of 'merchandise.' And if these payments, to the amount of 5154 dollars, can be added to the price of the goods shipped in this case, it would be difficult to say that they might not be added to the price of a much less quantity, or a much less valuable cargo. In truth, the sums payable to the owners of the ship, for the use of the ship, have, under this charter-party, no distinct relation to the goods. We are, therefore, of opinion, [*79] that the payments in question cannot be added to, *and considered as part of, the price of the goods. Our opinion in this case will have no effect on the question, whether the payment on the shipment of goods can be added to their price, so as to form part of their value in an open policy, if ever that question should arise. Such a payment is not properly freight, but the price of the privilege of putting the goods on board the ship, in order to have the opportunity of having them taken to the place of their destination: it relates specially and distinctly to the goods; and when it is constantly made, according to the usage of the trade, from and to any particular country, the usage may be supposed to be known to the underwriters, and may be (but we do not say that it will be, or ought to be) considered as part of the shipping charges, or, at least, as so analogous to as to be governed by the rule that is applicable to those charges in the construction of the policy."

The same doctrine was held in the case of *Palmer and others* v. *Pratt*. (*a*) Where a merchant advanced money to the captain of a ship, to pay for goods he was about to carry to India, on the security of two bills of exchange, payable on the contingency of his arrival there, and the merchant effected an insurance on the "ship and cargo," declared by the policy to be on the bills in question: it was held that, first, he could not recover, because the bills being on a contingency, were not valid: and, secondly, because he had not an insurable interest, but had a remedy over against the party for whose use the money was lent.

(*a*) 2 Bing. 185.

SECTION V.

AND ALSO UPON THE BODY, TACKLE, APPAREL, ORDNANCE, ETC., OF THE "GOOD" SHIP CALLED, ETC.

HAVING in the previous section discussed the law relating to the words "on any kind of goods and merchandises" *stated in the policy, and having pointed out the species of property which come under the [*80] general, and common, and usual form of the printed policy on "goods," and likewise the instances in which the subject-matter of the insurance must be specially stated, and "declared on" the face of the policy, and having entered at considerable length upon the nature and quantity of "interest" the assured must have in the subject-matter of the assurance; and also having stated the law on the important subject, where the statute law has interfered in the case of "wager" policies, and policies "on interest or no interest," or without further proof of interest, than the policy, "by way of gaming, or wagering, and without benefit of salvage;" and has enacted, that all insurances at this day, contrary to the stat. 19 Geo. 2, c. 37, are absolutely void and of no effect: we now come to a very important head, viz:—"on the body, &c., of the ship, and the master of the ship, for the voyage." Firstly, we shall speak of the names of the "ship" and "master." This is expressed in the policy, in the following terms—"and also upon the body, tackel, apparel, ordnance, munition, artillery, boat, and other furniture of, and in the good ship called the ——, whereof is master —— under God, for this present voyage—or whosoever else shall go for master in the said ship, or by whatsoever other name or names the said ship (*a*) or the master thereof, shall be named and called."

It seems to be necessary by the custom, and practice of merchants, that the names of the "ship" and "master" should be inserted in the policy, in order that the assurers may know with certainty the strength, age, and sufficiency of the ship, and the skill and knowledge of the captain. The usage in this matter is the same in respect to the rules in Foreign Maritime States. (*b*) Sometimes there are insurances "upon any ship or ships" expected from a particular place. And Mr. J. *Park* says, in his treatise, (*c*) "that although it is more accurate to insert the name of the captain, he would not be understood *to assert, as no decision has been made, that if a different captain [*81] came in the ship from that whose name is mentioned in the policy, it would therefore be bad, especially as the policy contains the words, "or whosoever else shall go for master in the said ship."

And it has been decided in a case of *Le Mesurier* v. *Vaughan*, (*a*) that an insurance would not be vitiated if the name of the "ship" was mistaken, provided the identity was proved, and where there was no fraud; for, as policies contain in the printed form, "or by whatsoever name the ship should be called"—those words are not confined to the case of the ship having another name, than that mentioned in the policy. The above case was on an insurance on "goods," described by the policy to be on board the "*American* ship *President;*" the real name being "*The President;* but the broker having been directed, that the ship was named "*President,*" and to designate her as an *American* ship, had by mistake described her as above. The Court were

---

(*a*) See 3 & 4 W. 4, c. 55, s. 24.
(*b*) Ord. of Lew. 14. Tit. Insurance, art. 3. Ord. of Amster. s. 2.
(*c*) Park Ins. p. 19. (*a*) 6 East, 382.

of opinion that the whole was to be taken as her name, and not as a warranty of "her being an *American* ship" called "*The President.*" And it was also held to be no variance, that the real name of the ship was "*The President,*" the identity of the ship with that name being proved, and no fraud in the transaction. And in delivering his opinion, Mr. J. *Lawrence* read a note of a case, decided by Lord C. J. *Lee*, at Guildhall, exactly in point. (*b*)

The insurance in that case was made "on *The Leopard*, or whatsoever name, &c., whereof was master. A. B., for that voyage, &c., "or whosoever else should be master." Upon the evidence of A. B., it appeared that this ship was called *The Leonard*, and was never called *The Leopard.* But the Lord Chief Justice was of opinion, that it was only necessary to prove the identity: which had been done by Captain A. B.

[*82] Also an insurance may be made on "ship or ships" "from *a particular place." This was held, in the case of *Kewley and another* v. *Ryan.* (*a*) The case was this: "an insurance is made on certain goods on board a certain ship on a voyage, at and from *Grenada* to *England;*" and another policy is also made "on any kinds of goods as interest, should appear on board 'ship or ships,' on the same voyage:" warranted to sail within a limited time; but no circumstances relating to the first policy are communicated to the underwriters of the second, nor do they know that the first was made. Goods to the full amount of the sum insured by the first policy, are put on board the specified ship, which arrives in safety. Also goods to the full amount of the sum insured in the second policy, were put on board another ship which sails within the limited time from *Grenada*, with an intention of touching at *Cork* on her way to *Liverpool;* and is lost before she arrives at the deviating point. The plaintiffs obtained a verdict for the second insurance which had been made. At the argument upon the rule for a new trial, it seemed that at the trial great doubts were entertained whether such a policy as this on "ship or ships" were a good one. The counsel for the plaintiff argued that these were well known to foreign nations: (*b*) and were constantly used by us in the *West India* trade in time of war, when it was uncertain by what ships the produce of the different islands might be sent to *Europe.* Mr. J. *Buller* cited the case of *Henchman* v. *Offley*, (*c*) in confirmation of the doctrine, that the assured had a right to appropriate: the Court took time to consider the question. And afterwards in Trin. Term, 1794, the Court, consisting of Lord *Loughborough*, C. J., Mr. J. *Heath*, Mr. J. *Rooke*, (*d*) declared their opinion as to the legality of the policy on "ship or ships," that it was too well established by usage and authority to be disputed. Rule discharged.

[*83] Secondly, a question respecting the carrying the "boat of *the ship and the practice in what manner, in some voyages, the boats may be placed on the ship," was one of the points in the case of *Blackett* v. *Royal Exchange Assurance Company.* (*a*) It was an action of covenant on a policy of assurance, on the ship "*Thames*, her tackle, apparel, ordnance, munition, boat, and other furniture," in the usual form.

At the trial before *Vaughan*, B., at the Sit. in London, the plaintiffs having proved the loss of a boat, which, with other damage subsequently incurred by stress of weather, amounted to more than 3 per cent. within the memorandum,

---

(*b*) Hall v. Molineux, Dec. 1744, at Guild. 6 East, 386.
(*a*) 2 H. B. 343. (*b*) Emerig. 173.
(*c*) B. R. Mich. 23 Geo. 3, H. B. 345, n.
(*d*) J. *Buller* was absent, but concurred in the judgment.
(*a*) 2 Cr. & J. 244; 2 Tyr. 266.

the plaintiffs proved that it was considered proper and necessary to sling the boats on the outside the ship, in voyages of the description of the insured. The defendants offered evidence of a usage, that boats slung on the outside of the ship on the quarter, were not protected by the policy. The learned Baron was of opinion, that such evidence of usage was inadmissible, and rejected it. The plaintiffs had a verdict, with leave given to the defendants to move on the rejection of the evidence of usage. Lord *Lyndhurst*, C. B., now in Hil. Term, 1832, delivered the judgment of the Court. "There were two questions," (one of which we have only at present to consider)—"one, whether parol evidence of an usage was admissible to show, that for boats on the outside of the ship, slung upon the quarters, underwriters never paid?" The policy is in the usual form, and as far as regards the ship, imports to be upon the ship (that is, the body,) tackle, apparel, ordnance, munition, boat, and other furniture of the ship, called "*The Thames.*" There is no exception, and the policy is, therefore, upon the face of it, upon the "whole ship, on all her furniture, and on all of her apparel." It was in evidence in the cause and admitted upon argument, that upon such voyages as that insured, ships invariably carry a boat in the place where this boat was carried, and slung as this boat was slung; and that the ship would not be properly furnished or equipped, unless she had a boat in that *place and so slung. The objection [*84] then to the parol evidence was this, that it was not to explain any ambiguous words in the policy, any word, which might admit of doubt, nor to introduce matter upon which the policy was silent, but was at direct variance with the words of the policy, and in plain opposition to the language it used. That, whereas the policy imported to be upon the ship, furniture, and apparel generally—the usage is to say, that it is not upon all the furniture and apparel, but only upon part, excluding the boat. Usage may be admissible to explain what is doubtful, it is never admissible to contradict what is plain. The cases are all in *Starkie upon Evidence.* (*a*) The authority referred to in the argument, as to the goods lashed on deck, seems to be plainly distinguishable, and to proceed upon a different principle.

"On an insurance 'upon goods,' the underwriter is entitled, in general, to expect that they shall be carried in that part of the ship usually appropriated to the stowage of goods, not in a more dangerous part; or, if they be goods which ought not to be placed in the ordinary stowage, but in a more perilous situation, he ought to be apprised, either of the goods, or of the part of the ship in which they are to be put. If he is left to suppose that they are ordinary goods, he will naturally suppose they will be placed where ordinary goods are placed, and that they will incur the hazard only of ordinary goods; and if he were to be made answerable for extraordinary peril, he would be answerable for a peril which he had not contemplated, and for which he had not received an adequate compensation. This, it seems to us, is the true principle upon which evidence of usage is admitted as to goods lashed on deck. They are not in the part of the ship where goods are usually carried, they are in more than usual peril, and a usage that they are not covered by an ordinary policy on goods, but that they require a distinct explanation to the underwriter, of the part of the ship in which they are to be *carried, or (where [*85] that will imply the same information) of the nature of the goods, is not at variance with any part of the policy, is essential to that information which the underwriter ought to receive, to enable him to estimate the risk and calculate the premiums, and is a portion of that fairness which ought to be rigidly observed upon all these contracts. The policy was upon goods gener-

(*a*) Pp. 754, 759, 3rd edit.

ally, and the usage explains what description is intended, viz: of ordinary, not of extraordinary danger. We are, therefore, of opinion, that the evidence of usage was properly rejected.

In the case of *Pelly* v. *Governor & Co. of the Royal Exchange*, (*a*) the plaintiff being part owner of the ship *Onslow*, an *East India* ship, then lying in the *Thames*, and bound on a voyage to *China* and back to *London*, insured it at and from *London*, to any ports or places beyond the *Cape of Good Hope* and back to *London*, upon the "body, tackle, apparel, ordnance, munition, artillery, boat and other furniture of and in the said ship." The ship arrived in the river *Canton*, in *China*, where she was to stay to clean and refit, and for other purposes. Upon her arrival there the sails, yards, tackle, cables, riggings, apparel and other furniture were by the captain's order taken out of her and put into a storehouse called a bank-saul, built for that purpose on a sand-bank or small island, lying in the said river near one of the banks called *Bank-saul Island*, in order to be there repaired, kept dry and preserved, till the ship should be heeled, cleaned and refitted. Some time after this a fire broke out in the bank-saul belonging to a *Swedish* ship, and communicated itself to another, and that to the one belonging to the *Onslow*, and consumed the same, together with all the sails, yards, &c. belonging to the *Onslow* that where therein. It was stated, that it was the universal and well known usage, and has been so for a great number of years, for all *European* ships which go to *China*, except *Dutch*, when they arrive near this *Bank-saul Island*, in the
[*86] *river *Canton*, to unrig the ships, and take out their sails, yards, tackle, cables, rigging, apparel and other furniture; and to put them on shore in a bank-saul as the *Onslow* had done. This is for the common and general benefit of the owners of the ship, the assurers and assured, and all persons concerned in the safety of the ship. The ship arrived safe in the *Thames*, after being fresh rigged, &c. for the voyage. The question for the opinion of the Court was, whether the insurers are liable to answer for this, so happening upon the bank-saul, within the intent and meaning of this policy. The Court took time to consider, and then, Lord *Mansfield*—"By the express words of the policy the defendants have insured the tackle, apparel and other furniture of the *Onslow* from 'fire,' during the whole time of her voyage, until her safe return to *London* without any restrictions. Her tackle, &c. were inevitably burnt in *China*, during her voyage, before her return to *London*. The event then, which has happened, is a loss within the general words of the policy; and it is incumbent on the defendant to shew, from the manner in which this misfortune has happened, or from other circumstances, that it ought to be construed a peril which they did not undertake to bear. If the chance be varied, or the voyage altered by the fault of the owner or master of the ship, the assurer ceases to be liable; because he is only understood to engage, save from fortuitous dangers, provided due means are used by the trader to obtain that end. But he is not in fault, if what he did was done in the usual course, and for just reasons. The assurer, in estimating the price at which he is willing to indemnify the trader against all risks, must have under his consideration the nature of the voyage to be performed, and the usual course and manner of doing it. Every thing done in the usual course must have been foreseen, and in contemplation at the time he engaged; he took the risk upon a supposition that what was usual or necessary should be done. In general, what is usually done by such a ship, with such a cargo, in such a voyage, is
[*87] *understood to be referred to in every policy, and to make part of it, as much as if it was expressed. The usage being foreseen is

(*a*) 1 Burr. 341.

rather allowed to be done, than what is left to the master's discretion, upon unforeseen events: yet, if the master *ex justâ causâ*, go out of the way, the insurance continues. Upon these principles it is difficult to frame a question which can arise out of this case, as stated. The only objection is, that they were in the bank-saul instead of in the ship; upon the land, not at sea, or upon water: and being appurtenant to the ship, losses and dangers on shore could not be concluded. The answer is obvious: first, the words make no such distinction. Many accidents might happen at land even to the ship. Suppose a hurricane to drive it a mile on shore, or an earthquake may have a like effect; suppose the ship to be burnt in a dry dock, or suppose accidents to happen to the tackle upon land, taken from the ship while accidentally and occasionally refitting, as on account of a hole in her bottom, or other mischance; these are all possible cases. But what might arise from an accidental repair of the ship is not near so strong as a certain necessary consequence of the ordinary voyage, which the parties could not but have in their direct and immediate contemplation. Here the defendants knew that the ship must be heeled, cleaned and refitted in the river *Canton;* they knew that the tackle would be then put into the bank-saul; they knew it was for the safety of the ship, and prudent that they should be put there. Had it been an accidental necessity of refitting, the master might have justified taking them out of the ship, *ex justâ causâ:* but describing the voyage is an express reference to the usual manner of making it as much as if every circumstance had been mentioned. Was the chance varied by the fault of the master? It is impossible to impute any fault to him. Is this like a deviation? No, it is *ex justâ causâ*, which always excuses. Had the assurers in this case been asked, whether the tackle should be put in the bank-saul; they must, for their own sake, have insisted that it should. They *would have had [*88] reason to complain, if from their not having had them put there, a misfortune had happened. In such a case, the master would have been to blame, and by his fault would have varied the chance. They have taken a price for standing in the plaintiffs' place as to any losses he might sustain in performing the several parts of the voyage, of which this was known and intended to have been one. Therefore, we are all of opinion, that in every light, and in every view of the case, in reason and justice, and within the words, intent and meaning of this policy, and within the view and contemplation of the parties to the contract, the assurers are liable for this loss."

In an assurance upon a *Greenland* ship, it became a question whether the lines and tackle employed in the fishery in those seas could be recovered under a policy made upon the "ship, tackle and furniture." It was the case of *Hoskins* v. *Pickersgill*, (*a*) and came before the Court upon a motion for a new trial, and the Judges were unanimously of opinion that they were not protected by the policy not being part of "the ship's tackle or furniture." And in the case of *Gale* v. *Laurie*, (*b*) C. J. *Abbott* says, "these stores are not considered as covered by an ordinary policy on the ship.

"But insurance is a matter of contract, and the construction of the contract depends in many cases upon usage. And the construction of a policy can furnish no rule for the construction of this act of Parliament, which was passed for purposes of a different nature," (53 Geo. 3, c. 159.)

But the Courts of law will not extend the constructions which they have put upon this contract, so as to allow a person to recover for the loss of that which he never intended to insure: for instance, it cannot be allowed to the owner of a ship who has insured the "ship" *merely* that he should be capable of

(*a*) B. R. 23 Geo. 3, East. T. (*b*) 5 B. & C. 156.

recovering the loss of a cargo laden thereon, or extraordinary wages paid to
[*89] the seamen, or provisions *consumed by the detention of the ship longer than it was expected. *Molloy* (*a*) says, "that if a merchant insure a 'ship' generally, and the 'ship' then happens to be laden, and is afterwards lost, the insurer shall not answer for the goods, but only for the 'ship.'" This rule of insurance is not contradicted by any foreign jurists. (*b*) We come now to consider some of the decisions in this country on the above rule.

The first important case that requires our notice, is that of *Fletcher and others* v. *Poole*. (*c*) In an insurance upon the "ship *Tartar*," at and from *London* to *Newcastle* and *Marseilles*, and at and from *Marseilles* to her discharging port or ports in the *West Indies*, (*Jamaica* excepted) the facts were, that being distressed she bore away for *Minorca*, and put into *Port Mahon*, where the captain obtained leave from the Vice Admiralty Court to have his ship surveyed, in consequence of which she was long detained; and the action was brought to recover the *extraordinary wages* and the *provisions* expended during the detention for these repairs. Lord *Mansfield* was of opinion, that such articles as *sailors' wages* and *provisions* while a ship is detained to refit, can never be allowed as a charge against the assurer on "ship," and a verdict was accordingly given for the defendant. In *Eden* v. *Poole*, (*d*) the action was of a like description, on a policy of insurance "on the *ship* and *goods* from *Ostend* to *Dominique*." The following were the facts of the case: that the ship met with bad weather, and was in great distress; that the crew threatened to take the command from the captain unless he would make for the next port; that he then went to *Ferroll* to repair his ship, and that by the time the repairs were done the crew forsook her; that he then got another crew, and at the moment he was going to sail, the *Spanish* governor stopped him; that after a detention of thirty-seven days she was discharged. This action was brought
[*90] for the *expense incurred by *wages*, *provisons*, *&c.*, during the demurrage at *Ferroll*. On the part of the assurer it was contended, and so held by Mr. J. *Buller*, who presided upon that trial, that the *freight* and not "*the ship*" were liable for this loss, and that the charge of demurrage could not be allowed upon this policy. The plaintiff was nonsuited.

The same principle was upheld in the case of *Robertson* v. *Ewer*, (*a*) which was a similar action of insurance on the ship *Dumfries*, "at and from *London* to *Africa*." In coming from thence on her way to the *West Indies*, she stopped at *Barbadoes* in December, 1781, for the purpose of watering, at which island an embargo was laid on all ships by order of Lord *Hood*, the commander-in-chief on the station. The action was brought to recover from the assurer upon "ship" the additional wages paid to the seamen, and the charges for provisions during this detention. Mr. J. *Buller*, at the trial, was of opinion that the only damage proved, being items for wages, provisions, and demurrage during the detention, could not be recovered under the policy on "the ship" only. To make the underwriter liable there must be a loss of the ship, for the policy is on the body of the ship only; and if she arrives at her port of delivery, be the voyage ever so long, you cannot recover under such a policy. The plaintiff was nonsuited. The following Term the whole Court refused a rule made to set aside the nonsuit: Lord *Mansfield* saying, "There is no authority to show that on this policy the assured can recover for such a loss, but it is contrary to the constant practice. On a policy on a 'ship,' sailors'

(*a*) B. 2, c. 7, s. 8.
(*b*) Rocc. d'Assecur. Not. 16.
(*c*) Sit. after East. 1769. Park Ins. 115.
(*d*) Sit. after Hil. 1785. Id. 117.
(*a*) 1 T. R. 127.

wages or provisions are never allowed; the insurance is on the body of the ship, tackle, and furniture, not on the voyage or crew. In this it is admitted that there was no damage done to the ship, tackle, or furniture." Mr. J. *Buller:* "I take it to be perfectly well settled, that you cannot recover on a policy on 'the body of the ship' for seamen's wages or provisions." These are not the subject of the insurance. The case put *at the Bar proves the rule; for if the ship had been detained in consequence of any injury [*91] which she had received in a storm, though the underwriter must have made good that damage, yet you could not have come upon him for the amount of wages and provisions during the time she was so repairing. Here the ship itself is safe, and the Court only look to the thing itself, which is the subject of insurance: and the wages and provisions are no part of the thing insured. In the case of *Brough* v. *Whitmore*, (*a*) which was an action on a policy of insurance on an "*East India* and *China* ship," and on the "tackle, ordnance, ammunition, artillery, and furniture of the ship," at the trial it appeared that whilst the ship was lying off *Bank-saul Island*, in the river *Canton*, it became necessary to refit her, for which purpose the stores and provisions were taken out and put into a warehouse, where they were destroyed by accidental fire. It was admitted that the policy covered all the articles but the provisions, which were merely for the ship's crew. It was contended for the defendant, that the *provisions* were *not protected* by the *insurance;* but one of the jury said, that it had been determined in Lord *Mansfield's* time, (*b*) that they came under the word "furniture," under which decision the merchants had since always acquiesced. The plaintiffs obtained a verdict, which was afterwards upheld by the Court above. (*c*) Lord *Kenyon* said, "On the trial of this cause, I had nothing to guide my judgment on the construction of this instrument but the words of the policy; and when it was stated that "provisions" were included in the word "furniture," I confess I was somewhat at a loss to know to what extent the underwriters were liable on words so indefinite as those which are used. But then I thought, and still continue to think, that the rule of law is to be given, not by merchants but by the Court, though when a question *arises on the construction of the words of an instrument which [*92] are in themselves ambiguous, it is a matter fairly within the province of those who alone act upon these instruments to declare the meaning of them; and I remember it was said many years ago, that if *Lombard street* had not given a construction to policies of insurance, a declaration on a policy would have been *bad on general demurrer*, but that the uniform practice of merchants and underwriters had rendered them intelligible. The question here arises upon the meaning of the word "furniture." One of the jurymen said, and in that he is now confirmed, that according to the understandings of those who enter into these contracts, it includes the provisions for the use of the crew; and this ship being at *Canton*, it became necessary to refit her, and take out all her goods, and land on this island, where the accident happened, by which these provisions, with the rest of the goods, were burned. Then, if these provisions be insured as part of the outfit of the ship, and they were consumed by one of the perils insured against, there is an end of the question: a loss has happened within the meaning of the policy, and the defendant is liable. If this decision were to militate against any determination, or even *obiter dictum* of Lord *Mansfield*, I should have hesitated for some time before I delivered my opinion. But the case of *Robertson* v. *Ewer* is clearly distinguishable from the present:

(*a*) 4 T. R. 206.
(*b*) See Lord Mansfield's words in Robertson v. Ewer, 1 T. R. *ante*, p. 90.
(*c*) The provisions had not been eaten but destroyed by a peril insured against "fire."

here the goods were consumed by an accident by fire on board the ship, (for the island was for this purpose equivalent to the ship) and within the meaning of the policy of insurance; but in that case they were consumed by the negroes during the detention of the ship."

Although it might have been hoped that Lord *Mansfield's* decision in the preceding case of *Fletcher* v. *Poole*, supported as we have seen it to be by subsequent well considered important cases, would have set at rest the endeavour, on the part of the assured, or their advisers, any further attempt to review the reasonable nature of the law pronounced in that case; we find, however, this [*93] *doctrine of Lord *Mansfield's* disputed in a very recent case of *Devaux* v. *Salvador*, (*a*) after the question had laid at rest, and had not been mooted for many years. It was an action on a policy of insurance on "ship," in which the assured attempted to charge the underwriters with a sum of money expended in additional wages, paid to the crew whilst the ship was detained by the necessity of repairing certain damage, done by the perils of the sea, and likewise, with a sum of money which the ship insured had to pay another ship, with which there had been a collision, upon a settlement made by the Court of Admiralty, at *Calcutta*. Upon the trial, the Lord Chief Justice *Denman* told the jury that the underwriters were not liable for either of these items, and the defendant had a verdict. A motion was afterwards made for a rule to shew cause why the verdict should not be entered for the plaintiff for the two sums in question. The Court took time to consider the matter, and on a subsequent day, 30th Jan. 1836, Hil. Term, the judgment of the Court was delivered by Lord *Denman*, C. J. "This was a motion for a new trial in an action of *assumpsit*, tried before me at *Guildhall*, on the insurance of a 'ship' for loss by perils of the sea. The jury found a verdict according to my directions, excluding the expense for wages and provisions incurred from the time of her repairing damage sustained from a storm, and excluding also a sum of money which the owners had paid in consequence of some proceedings commenced in the Court of Admiralty, at *Calcutta*, in consequence of an accidental collision with another in the *Hoogly* river. The new trial was moved for on the ground, that both these heads of damage ought to have been taken into account by the jury. We think it clear, on authority, that the former item ought not to be allowed. As long ago as 1769, in *Fletcher* v. *Poole*, (*b*) the point was decided by Lord *Mansfield* at *Nisi Prius*. The [*94] doctrine has been cited in the text books ever *since that period, and is expressly recognized by *Buller*, J., in *Robertson* v. *Ewer*. (*a*) The facts of that case did not indeed require the doctrine, which is merely assumed in the argument of that learned Judge to illustrate his opinion on the case then before the Court. Mr. *Maule*, therefore, urged that the law rested on a single decision of Lord *Mansfield* at *Nisi Prius*; but when we consider the high authority of that great master of insurance law, that that case was unquestioned,—that it received the sanction of so eminent a lawyer, who treats it as clear enough to lay the foundation of a principle from analogy; when it is fully adopted in the works of distinguished writers on the subject; and above all, when we find no trace of even a claim being set up inconsistent with it for nearly seventy years, though events must have afforded the opportunity many thousand of times, we think this point must be regarded as fully established, and that we should not be justified in casting any doubt upon it. The second point appears to be entirely new, which circumstance is not so strong an argument against it as against the former claim, because the event is likely to have

(*a*) 4 A. & E. 420.
(*a*) *Ante*, p. 90.
(*b*) *Ante*, p. 89.

been of much less frequent occurrence. But if we look for the principle on which *Fletcher* v. *Poole* was decided, it must obviously be that well-known maxim of our law, *in jure non remota causa sed proxima spectatur.* 'It were infinite,' says *Bacon*, (*b*) 'for the law to judge the causes of causes; therefore, it contenteth itself with the immediate cause, and judgeth of acts by that, without looking to any farther degree.' Such must be understood to be the mutual intention of the parties to such contracts. Then how stands the fact? The ship insured is driven against another by stress of weather; the injury which she thus sustains is admitted to be direct, and the underwriters are liable for it. But the collision causes the ship insured to do some damage to the other vessel: and whenever this effect is produced, both vessels being in fault, a positive rule of the *Court of Admiralty requires the damage done to both ships to be added together, and the combined amount to be equally divided between the owners of the two. It turns out that the ship insured has done more damage than she has received, and is obliged to pay the owners of the other ship to some amount under the rule of the Court of Admiralty. But this is neither a necessary nor proximate effect of the perils of the sea, it grows out of an arbitrary provision in the law of nations, from views of general expediency, not as dictated by natural justice, nor (possibly) quite consistent with it; and can no more be charged on the underwriters than a penalty incurred by contravention of the revenue laws of any particular state, which was rendered inevitable by the perils insured against. We think, therefore, that no rule ought to be granted." Rule refused. [*95]

Having now considered the law relating to what can or what cannot be recovered from the underwriters on a policy on "the body, &c. of the ship:" we are now to consider, secondly, what is meant by the application of the term "good," which is used in the policy with regard to the ship, which is to be the "subject of insurance," either itself, or which is to carry the goods which are to be the subject-matter. This term, as applying to the ship itself, can mean nothing more or less than the allegation that the ship (to be insured) is good enough, (that is to say of sufficient strength, stability and excellence in its construction and condition at the time when the risk of the underwriters is to commence upon it;) and that it is in fact good and capable enough to perform the voyage intended, (reserving the possibility of the losses which must happen in consequence of the perils which the underwriters take upon themselves.) This term "good" is, in the phraseology of mercantile and nautical affairs, included in what the law means, when it is called the "seaworthiness of a vessel," and which we shall have occasion more particularly to specify in what it consists. It may, however, be prefaced, by saying, that as this declaration comes early in the body of the *policy, so is it of the first importance, and of the essence of this contract," that the vessel in question shall be at the time of executing the policy, or at least at the moment of the commencement of the underwriter's risk "good," that is, "seaworthy" for the "voyage insured." [*96]

I shall first mention some authorities to shew how strongly the Judges have always spoken when the question of the "seaworthiness" of the ship at the time of the insurance has come into controversy. In the case of *Carter* v. *Boehm*, (*a*) which was decided in Easter Term, 1766, Lord *Mansfield*, in discoursing upon the case then before him, affirms the law respecting the necessity of a ship being "seaworthy" when she is insured: for he says, "The utmost that can be contended for is, that the underwriters trusted that the fort being in

(*b*) Maxims of the Law, p. 35. Law Tacts.
(*a*) 3 Burr. 1913.

the condition in which it ought to be; in like manner as it is taken for granted that a ship insured is 'seaworthy.'" And again, his Lordship, in a later case, where the same principle was much relied on, said, "By an implied warranty every ship insured must be tight, staunch and strong; but it is sufficient if she be so at the time of her sailing. She may cease to be so in twenty hours after her departure, and yet the underwriter will continue liable." (*b*)

The late Mr. J. *Park*, in his treatise, (*c*) says, "that the most material case (at the time he wrote) on this part of our subject was that of the *Mills Frigate*, which underwent a variety of discussion in several Courts, and in which all the principles on which this doctrine is founded were fully discussed." I shall take the liberty to copy what is said of this case from the learned Judge's treatise. He says:—"I have used my utmost endeavours to procure a copy of the opinions of the Judges upon that case, but they have been ineffectual; [*97] therefore the reader must be satisfied with a full statement *of the circumstances, as they appeared upon the demurrer to the evidence. (*a*)

"This was an action on a policy of insurance, lost or not lost, at and from the *Leeward Islands* to *London*, warranted to sail on or before the 26th of *July*, upon any kind of goods, wares, and merchandises; and also upon the body, tackle, &c., of and in the good ship or vessel called the *Mills Frigate*, beginning the adventure on the goods from the loading thereof on board the said ship at *St. Kitt's*, and upon the ship from her arrival at the *Leeward Islands*. The defendant undertakes to indemnify against the usual risks for a premium of 2*l.* 10*s.* per cent. The loss was described in the first count of the declaration, in these words:—'That the said ship, after her departure from *Nevis* on her voyage, and during her said voyage, sailing and proceeding on the high seas by and through the force of winds and tempestuous weather, and by and through the mere perils and dangers of the seas, sprang divers leaks, and became very leaky, crippled, bulged, disjointed, split, and wholly lost.' In the second count the loss is alleged thus:—'By and through the mere perils and dangers of the seas, and by the starting and loosening of one or more plank or planks of the said ship, and by accidentally springing one or more leak or leaks, the said ship became very leaky, crippled, &c., and totally unable to proceed on or perform the said voyage.' There were two other counts in the declaration upon a policy on freight, to recover from the underwriter the amount of his insurance upon that also; and a fifth count for money, had and received to the plaintiff's use. The defendant pleaded the general issue, and paid the premiums into Court.

[*98] This cause came on to be tried before Lord Chief Baron *Parker*, *and the defendant demurred to the evidence produced on the part of the plaintiff. The demurrer follows in these words:—'Thereupon the said *John* and *Thomas Mills* (the plaintiffs) show in evidence to the jury to prove and maintain the issue within-mentioned on their part, to wit, that the defendant underwrote the policy of insurance, and that the plaintiffs were interested to the amount as in the declaration is mentioned: that the ship in question was a *French* built ship, and known to be so to the defendant at the time he underwrote the said policy: that the timbers of *French* ships are

---

(*b*) Eden v. Parkinson, Dougl. 732. (*c*) Page 160.

(*a*) Mills and another v. Roebuck, in the Exchequer. Before this action in the Exchequer was brought, an action upon the same policy had been tried in the Court of Common Pleas before Lord *Camden*, who directed the jury to find for the plaintiff. But upon a motion for a new trial, he altered his opinion, and the Court unanimously determined that the ship, not being seaworthy, the plaintiffs, however innocent they might be, could not recover.

usually fastened with iron bolts or spikes, which are liable to grow rusty: and when the same are grown rusty the timbers of such ships frequently become loose at once, and the ships are rendered incapable of bearing the sea, without any perceptible symptoms of decay: that the ship in question was purchased by the plaintiffs in the year 1757; that since that time she has been generally employed by the plaintiffs, who are *West India* merchants, in that trade; and large sums have consequently been insured on her and her cargoes: that in *February*, 1764, being bound to the *Leeward Islands*, and back again to *London*, she sailed on her voyage; that before she sailed from *London* on that voyage, the plaintiffs ordered the captain to have every thing done to the ship which he should think proper to repair her; that in pursuance of such orders, the ship was put into dock and repaired, where the ship-carpenter did all such repairs to her as he was ordered, the expenses of which amounted to about 100*l.*, of which about 30*l.* was for the sheathing and other repairs of her hull, and the residue in her upper works: that nothing more appeared to the ship-carpenter or the captain to be wanting to make her fit and complete for the said voyage; but her iron bolts and spikes were not then examined, which could not be done without taking off her sheathing—an act never done where (as the case is here) the ship had been sheathed a little time before; that George Hayley, Esq., the first underwriter in this policy, and many other persons by whom policies of insurance are generally underwritten, keep *a register in which all ships usually insured by them are [*99] entered, with an account of the age, construction, and visible goodness of the vessels, and to whom they belong, and also employ a surveyor, whose business it is to survey such ships: that the ship in question, at the time of underwriting the policy, and long before, had been entered in such register; and, previous to her last outward-bound voyage, had been surveyed by one Thomas Whitewood, who was then employed by the said George Hayley, and other underwriters, as such surveyor; and, as far as appeared to the said Thomas Whitewood, was in good condition, and perfectly fit to undertake a voyage to and from the *Leeward Islands;* but the surveyor did not, neither could he examine the bolts and spikes, for the reasons aforesaid, but did survey, as far as is ever practised in such cases: that the said George Hayley had often before underwrote policies on the said ship and her cargoes; and the witness, who was the insurance-broker, said he believed Mr. Hayley knew as much of the condition of the said ship as the plaintiffs did, and particularly on the outward-bound voyage to the *Leeward Islands*, he underwrote 400*l.* on this ship: that in such last outward-bound voyage the ship met with a great deal of bad weather, was very leaky, and could not get into *Madeira*, where she was ordered to touch, but was obliged to bear away for the island of *Nevis:* that she arrived at the island of *Nevis*, on the first of *April*, 1764, and from thence went to the island of *Saint Christopher*, where she delivered her outward-bound cargo, and had such repairs done to her as were then thought necessary, and to all appearance put into a proper condition for her voyage home; but her bolts and spikes were not, nor could be examined there: that about the end of the said month of *April*, the ship sailed from *St. Kitt's* to *Nevis*, where the captain had been promised a loading for her home: that on her arrival at *Nevis*, the planters, knowing she had been leaky in her outward-bound voyage, were not willing to put sugars on board her; and that, in order to satisfy the planters there that she was in a proper condition to carry a *cargo of sugars to *London*, they proposed to the captain, as a [*100] measure which would be fully satisfactory to them, that he should submit the ship to be surveyed by all the captains then in the harbour, being six in number; and told him that if they should report her to be fit for a voyage to *London*, they would then load her with sugars: that the captain did submit to

such survey, though it would have been for the interest of the said captains to report the ship unfit for the voyage, as by that means they would have had an opportunity of gaining more freight and sooner: that on the 8th day of *May*, 1764, the said captains, after having surveyed her carefully, but without examining her bolts and spikes, which could not be done there, signed the following report:—'*Nevis*, *May* 8th, 1764. At the request of Captain George Finch, of the ship *Mills Frigate*, we, the subscribers, did repair on board the said ship, and, after due examination, it did appear to us that the occasion of the ship's making more water than usual on her voyage from *London* to this place, was occasioned by some neglect in caulking the said ship, which may very easily be made tight, the said ship otherwise appearing to us to be strong and sound; and when caulked, we are of opinion, will be fully sufficient to carry a cargo of sugars to *London*. John Shepherd, &c.' That afterwards the ship was caulked, according to the said report, and that thereupon the planters sent their sugars on board, and the ship was soon loaded with about three hundred and seventy hogsheads of sugar: that during the time of her loading, and until and at the time of her sailing, which was about two months, the ship continued tight, appeared to be in good condition, and made no more water than the best ships usually do, and are expected to do: that the ship sailed from *Nevis*, on the 26th day of *July*, 1764, about eight o'clock in the evening, and the next day, about four o'clock in the afternoon, without any bad weather, or extraordinary swell of the sea, she sprang a leak, and the captain was obliged to bear away for *St. Christopher's*, where he arrived on
[*101] the 28th *July:* that on his arrival there, he got the ship unloaded, to *see what was the matter with her, when it appeared that she had started a plank: that he thereupon applied to the Judge of the Court of Vice Admiralty for a warrant to survey the ship, and a warrant was granted to four captains and two ship-carpenters, or any three of them; four of whom did, according to such warrant, survey the said ship, and did report, that she was unfit to proceed on her voyage, without being thoroughly repaired, and that the expense of so repairing her there would amount to more than the value of the ship and freight; and she was, therefore, condemned by the said Court as unfit for the said voyage: that some of the iron bolts and spikes with which the timbers of the ship in question, like other *French* built ships, were fastened, were broken in the plank that was so started, which the captain and the said surveyors felt by passing up their hands between the plank and the ship, and which appeared upon farther opening the ends of the plank, and that the said plank was started from one end to the other: that it was owing to the said bolts and spikes being grown rusty and decayed, as then appeared to the captain and surveyors, that such plank started: that he believed the surveyors who condemned her thought the same; wherefore, and supposing the other bolts and spikes in the ship were also grown rusty and decayed, though that could not be known for certain, without ripping off her planks and making a more strict examination, the surveyors made their said report of condemnation: that the said plank was not taken off, nor could it be, without sinking the ship, which has not yet been broken up, but continues at *St. Christopher's* as a hulk: that on the aforesaid account it was then concluded, and is now believed by the captain, that the said ship was not fit for the insured voyage home at the time she so sailed from *Nevis* for *London*, though, to all outward appearance, she was a very good ship, and, as he then believed, proper for the voyage; and such a ship as he, from her outward appearance, should have had no objection to sail in again; but had he known the decayed condition of her said bolts and spikes, before he set sail on his homeward-bound voyage, he
[*102] would not have ventured his life in her: that there *is no dock, nor scarce any materials for repairing ships at *St. Christopher's*,

nor could she sail to any other place to be repaired; and that if this misfortune had happened in *North America* or *England*, where there are proper docks and materials, she might have been repaired for three or four hundred pounds: that while the said ship was first at *St. Christopher's*, before she had taken in her cargo, namely, on the 23d of *April*, 1764, the captain wrote the following letter to the plaintiffs:—

"*St. Christopher's*, *April* 23, 1764.

"Gentlemen,

"I take the first opportunity of acquainting you, that I arrived at *Nevis*, after a most dismal passage, on the first instant. On the sixth of *March*, at day-break, I made the islands, *Deserts*, distant about four leagues, ran down for *Madeira*, with a fresh gale at E. S. E. till four in the afternoon, when being within a mile off the shore, and judging about five or six miles off *Fenchall Road*, a very hard and dark squall took us suddenly with such violence, that I was obliged to clear off the land under the courses. It was excessively hazy the whole evening after, that one could hardly see the ship's length; so that it would have been the greatest imprudence to have run the risk of overshooting our port, or running ashore. The gale increased, and, in the night, came round to the N. E. and the ship strained so much by the pressure of sail we were obliged to carry on her in that great sea, that it was with the utmost difficulty we could keep her free. On the eighth, at nine in the morning, reckoning myself nineteen leagues to leeward of *Madeira*, our ship so loosened that we could not carry sail upon a wind; and seeing no probability of the wind shifting or abating enough to give us a chance of beating up, bore away for *Nevis*, judging it better for the preservation of the whole than to run any hazard in endeavouring for the *Canaries* in our weak, leaky, and distressed condition. I have consulted with Mr. *Cottle*, the counsellor here, who advises me to sell the flour and lime at public vendue, and to carry the iron *hoops, &c., back to *England*. As the ship's complaint has been [*103] chiefly in her upper works, I am obliged to have her new nailed from the wail upwards; and hope you will find that what repairs are necessary to be made here, are conducted with all the frugality circumstances will admit of."

That the plaintiffs received this letter in *London* on the 13th day of June, 1764, and, a day or two afterwards, gave it to Matthew Towgood, an insurance broker, to get 1,000*l.* insured on the freight home for the use of the owners, and 250*l.* on their fourth part of the said ship: that the said Towgood first showed the policy in question and the letter to the said George Hayley, on the 19th of June, 1764, who, after reading over the letter, asked him what interest he had to insure; to which the broker answered, ship, freight, and cargo; and that he might write which he pleased; that thereupon the said George Hayley said he would underwrite the ship, saying she would come home safe enough, notwithstanding the damage which the said letter imported she had received, as it was a summer-voyage; but that she would very likely damage her cargo: that the said George Hayley was going to underwrite the said policy for 300*l.* on the said ship, and had wrote the figure three: but on the said Matthew Towgood's telling him, he was a bold man to write three hundred pounds after reading the said letter, the said George Hayley struck out the figure three, and converted it into a two, and accordingly underwrote the said policy for the sum of two hundred pounds on the said ship: that the said Matthew Towgood showed the said letter to the said defendant Roebuck, and all the other underwriters on the said policy, before they underwrote the same; and the said defendant says, that the evidence aforesaid, in manner and form aforesaid, shown by the plaintiffs to the jury, is not sufficient in law to maintain the issue within joined on the part of the said plaintiffs; and that he the defendant, to the evidence aforesaid, hath no necessity, nor by the law of the land is

[*104] obliged to answer. Wherefore he prays judgment, *and that the jury may be discharged from giving any verdict upon the issue.

This demurrer was argued in the Court of Exchequer, and judgment was there given in favour of the assured; and of what fell from the Judges on that occasion, I have been only able to procure this account, "that judgment was given for the plaintiffs, not upon the points argued (namely, that it was essential that the ship should be seaworthy,) the Court being as to those of opinion with the underwriters; but because the evidence did not, as the Court thought, precisely prove that the ship was not seaworthy, at the time of the insurance taking place, on the first of April, 1764, on her arrival at *Nevis*, but only that she was so at the time of her sailing, on the 26th of July." But the Court unequivocally declared, that a ship, that is not at the commencement of the insurance in fit condition to perform her voyage, is not a fit subject of insurance. Upon this judgment a writ of error was brought in the Exchequer-chamber, which was argued before Lord *Mansfield* and Lord Chief Justice *Wilmot*, who were to report their opinions thereon to the Lord Chancellor; and the judgment of the Court below was ultimately affirmed. Whether the judgment was so affirmed upon the specific ground taken in the Court of Exchequer, or upon some difficulty arising out of the form of proceeding, (being upon a demurrer to evidence) (*a*) does not appear: but whether upon the one ground, or the other, there is no doubt, though judgment was given for the plaintiffs, that the principles of insurance law upon the subject of seaworthiness, and the doctrine of implied warranties or conditions, have always been

[*105] *considered as unalterably fixed and ascertained since that period, although that doctrine was not then for the first time stated in our *English* Courts, and was certainly long before known in the law of insurance in other parts of *Europe*. It is unfortunate that from the circumstance of there being no printed report of this case, and from the practice of the two Chief Justices reporting their opinion in private, the grounds of that opinion cannot now be obtained: but it cannot be disputed from the opinions of Lord *Mansfield*, and other Judges, both before that time and since, that the principles laid down in the beginning of this chapter are clearly established as the law of *England*.

The principles of the law of this country on this head of the law of marine insurance, so declared and laid down in the above case, have been confirmed and established by numerous subsequent, and likewise more modern decisions.

In a case of *Lee* v. *Beach*, (*a*) the plaintiff had purchased a ship, and after having her surveyed by proper judges, he sent her into the dock, and there had her fully repaired, and the ship-builder was ready to swear, that he effectually repaired her, as he thought, having done all that was required to make her a "good" ship; she then was taken into government service, on which occasion she was, as usual, surveyed by the persons employed for the purpose. She sailed out of the *Thames*, and arrived at *Portsmouth*, but being very leaky, with bad weather, the Admiral ordered her to go in and undergo a survey there. This was done, and it was found, on opening her, that some timbers near her keel, were so bad, that she was condemned as insufficient to proceed. The

---

(*a*) This judgment probably proceeded upon the ground that the assurer, by demurring to the evidence given on behalf of the plaintiffs, had admitted upon record the truth of every fact and every conclusion, which, upon the evidence stated, might have been found by the jury in favour of the party who adduced it; but yet even upon the facts stated it would seem difficult to reconcile the verdict with the true principles of the law of insurance. See the opinion of Mr. J. *Buller*, in Cocksedge v. Fanshaw, Doug. 134, and of C. J. *Eyre*, in the case of Gibson v. Hunter, 2 H. Bl. 205.

(*a*) Sit. at Guild. after Mich. 1762. Park Ins. 468.

plaintiff having insured her, applied to the underwriters for the loss; the defendant was one; and the plaintiff insisted that he had done everything in his power to send her out, sufficient and good, and that this defect was a latent cause not known to him, or discovered when she was surveyed, or in the dock repairing. Lord *Mansfield* said, "that *it appeared that the ship had died a natural death, and had received her death blow before [*106] she was insured; and, however innocent the assured was, and however cautiously he had acted, the underwriter was equally innocent; and the implied warranty must and ought to have its effect, and the plaintiff must make the best of a bad bargain." The plaintiff was nonsuited.

And in the case of *Munro* v. *Vandam*, (*a*) it was held that, if a ship sail upon a voyage, and in a day or two become leaky and founder, or is obliged to return to port without any storm, or visible or adequate cause to produce such an effect, the presumption is, that she was not "seaworthy" when she sailed, and that the jury upon the plaintiff's own case may draw such a conclusion. And on an appeal from *Scotland*, in the case of *Watson* v. *Clarke*, (*b*) in the House of Lords, it was said by two of their Lordships, "That where the inability of the ship to perform her voyage, becomes evident immediately after leaving the port, or in a short time after the risk commences, without any apparent cause of injury, the presumption is, that this inability has arisen from causes existing before her setting sail on her intended voyage, and that the ship was not then seaworthy, and the *onus probandi* in such a case is thrown upon the assured, to shew that the inability arose from causes subsequent to commencement of the voyage, and attaching of the risk. (*c*) Lord *Eldon*, in giving judgment in the case of *Douglas* and others v. *Scougall* and others, (*d*) says, "This is a mere question of fact whether the ship, when she sailed from *Leith* to *Picton* was seaworthy, or well furnished, tight, staunch and strong for the voyage insured. I have often had occasion to observe here that there is nothing in matters of insurance of more importance than the implied warranty that a ship is seaworthy when she sails upon *the voyage insured. It is not necessary to inquire whether the owner acted honestly or fairly [*107] in the transaction: for it is clear law that, however just or honest the intentions and conduct of the owner may be, if he is mistaken in the fact, and the vessel, in fact, be not seaworthy, the underwriter is not liable." His Lordship observed, "that the injury sustained by the vessel appeared to be the effect of decay, and not of sea-damage, that the survey made after the ship's return differed from the one made before her departure; that when the original survey was made, the outer skin or coating was not taken off, and that the captain was not fully examined upon the trial; and he declared that it was perfectly manifest, and proved to his entire satisfaction, that the vessel was not seaworthy for the voyage when she sailed, whatever might have been the opinion of the owners and carpenters who repaired her."

And in another case of *Wilkie* v. *Geddes*, (*a*) in the House of Lords, his Lordship stated that, under this *implied warranty*, it is not only necessary that the hull of the vessel be tight, &c., but that the ship be furnished with ground tackling sufficient to encounter the ordinary perils of the sea; and, therefore, when the best bower anchor, and the cable of the small bower anchor were found defective, the ship was not seaworthy.

(*a*) Sit. before Lord Kenyon at Guild. after Mich. 1794.
(*b*) 1 Dow. 336.
(*c*) See also Parker v. Potts, 2 Dow. 23. Watt v. Morris, 1 Dow. 32. Foster v. Steele, 5 Scott, 25; 3 B. N. C. 892.
(*d*) 4 Dow. 269.

(*a*) 3 Dow. 57.

So in the case of *Oliver* v. *Cowley*, (*b*) which was an action brought by an innocent shipper of goods (and no part-owner of the ship) against the underwriter, and the policy was on "goods in the *Amy and Laetitia*, at and from *Montserrat* to *London*;" and it appeared that the ship sailed 26th *July*, and the next day, without bad weather, she became very leaky, and obliged to run for *St. Thomas's*, one of the *Virgin Islands*, where she was unloaded, and the goods, being much damaged, were sold; and it could not but be allowed on all sides that the ship was not seaworthy to take the voyage insured; and it
[*108] was admitted by the defendant, that the *shipper of the goods was a stranger to the ship when the goods were shipped. The plaintiff was nonsuited; Lord *Mansfield* saying, "that the implied warranty could not be dispensed with in any case; that it was a point of law, and if the plaintiff's counsel thought there was any ground to go upon, he would save the point; but the counsel declined this, being satisfied that the case was clear against them." The plaintiff was nonsuited.

In a later case, the law respecting the *implied warranty* of "*seaworthiness*" was clearly laid down, and the reason of it shown by Mr. J. *Lawrence*. It was the case of *Christie* v. *Secretan*. (*a*) The learned Judge said:—"I also doubt whether there is any analogy between a case like the present and cases where there is implied warranty of seaworthiness. The latter is implied from the nature of a contract of insurance. The consideration of an insurance is paid, in order that the owner of a ship, which is capable of performing her voyage, may be indemnified against certain contingencies; and it supposes the possibility of the underwriters gaining the premium. But if the ship be incapable of performing the voyage, there is no possibility of the underwriters gaining the premium; and, if the consideration fails, the obligation fails. In the case of the *Mills Frigate*, it was said that the ship's being capable of performing the voyage was the substratum of the contract of insurance. So if a ship sail, without a sufficient crew, she is incapable of performing the voyage."

But it is, however, to be observed, that when it is said that a ship must be perfectly seaworthy, and equipped for the voyage, at the time of the commencement of the risk, this is nevertheless to be taken with a reference to her situation and condition in different periods of the voyage to which the risk attaches. For instance, if the policy attaches whilst a vessel is in harbour, taking in her
[*109] cargo, it never can be required that she should be in that complete *state of repair and of equipment, with regard to her crew and furniture, as would be necessary when she leaves the harbour and regularly sets sail on her voyage. Again, if the character of the voyage be such that at different points of it a difference in the number of her crew or state of equipment would, in the usual course of navigation, take place, all that can be required of the assured is, that at those different points and divisions in the voyage the ship shall be respectively in such a state and condition, with regard to her repairs, furniture, and crew, as is commensurate with her then risk, or, which amounts to the same thing, as is in conformity with the acknowledged practice and mode of navigation. (*a*) If, for instance, it be usual for the master of a vessel to take in a pilot at a particular place, and that the pilot should quit the vessel at another, if the loss occurs either before the ship's arrival at the spot where the pilot should have been taken in, or after the period when it is customary that he should resign the ship again into the command of the master, the underwriter cannot seek to discharge himself on the ground of the absence of the

(*b*) Sit at Guild. after Trin. Term, 1765. Park Ins. 470.
(*a*) 8 T. R. 192.
(*a*) See Graham v. Barras, 5 B. & Ad. 1011.

pilot, because at one particular point in the voyage his presence constituted an essential ingredient in the seaworthiness of the ship.

These general principles relating to this part of the subject will be found to be fully supported by the following decisions:—

Thus in the case of *Forbes and another* v. *Wilson*, (*b*) where a policy of insurance was effected on the ship *Henry*, "at and from *Liverpool* to the coast of *Africa*," it appeared that at the time the policy was made the ship was not in a condition to go to sea, but was, in fact, at the time, undergoing very material repairs; and it was contended by the underwriters that, as the risk was "at" as well as "from," if the ship was not seaworthy, from whatever cause, when the policy was subscribed, it was void; and that any repairs done afterwards, so as to make her completely seaworthy at the *time of sailing, would not cure that defect. But Lord *Kenyon* was of [*110] opinion that, under the words "at and from," it is sufficient if the ship, at the time of sailing, be "seaworthy;" for, from the nature of the thing, the ship while at the place probably must be undergoing some repair. The plaintiffs had a verdict, and no motion was made to set it aside. (*a*)

And in a later case of *Hibbert and others* v. *Martin*, (*b*) where the case of *Forbes* v. *Wilson* was quoted, Lord *Ellenborough* said, "I agree with the doctrine of that case: it is quite sufficient if the state of the ship be commensurate to her then risk. There may be a seaworthiness sufficient while in harbour, and there is a state of seaworthiness for the voyage. (*c*)

And it was held in the Common Pleas, in the case of *Annan* v. *Woodman*, (*d*) that a ship much out of repair may be sufficiently seaworthy for a harbour, and is protected under the word "*at*;" and as full complement of sailors is not necessary for her in harbour, she does not cease to be seaworthy for want of a crew, till she sails out of harbour without a sufficient crew. And it was held that if a ship, sufficiently seaworthy in port, sail without being rendered seaworthy for the voyage, yet by the word "at" in the policy, the risk attached, and that, therefore there could be no return of premium. (*e*)

The vessel when she sails from port, must be provided with a sufficient crew, (*f*) and with a captain of competent skill for the voyage. And where there was an express warranty, in a case of *Tait* v. *Levy*, (*g*) that the ship should not go higher up the *Mediterranean* than *Tarragona*, but the captain was *so ignorant of the coast, as to mistake *Barcelona* (which lies [*111] further up the *Mediterranean*) for *Tarragona*, and on entering the former port was captured; it was held that the underwriters were discharged, on the ground of the want of competent skill in the captain.

But where there is an admission by assurers, that a vessel is to be taken as seaworthy, they are bound by that admission.

In a case of *Proctor and others* v. *Thorburne and others*, before Lord *Denman*, at the *Liverpool* Summer Assizes, 1842, (*a*) where there was a clause in the policy "that the vessel should be taken to be seaworthy." His Lordship held that the plaintiffs were entitled to the verdict, unless the jury were of

---

(*b*) Sit. after East. Term, 1800. Park Ins. 472.

(*a*) See Smith v. Surridge, 4 Rep. 25, where Lord Kenyon held the same opinion.

(*b*) Guildhall, M. T. 1808. Park Ins. 473.

(*c*) The commencement of the voyage means "sailing from port." Graham v. Barras, 5 B. & Ad. 1011.

(*d*) 3 Taunt. 399. (*e*) See Hucks v. Thornton, 1 Holt, 30.

(*f*) Clifford v. Hunter, M. & M. 103. Forshaw v. Chabert, 3 B. & B. 158. Per J. Bayley, in Busk & R. Ex. Co. 2 B. & A. 83. Walker v. Maitland, 5 B. & A. 175. Ridsdale v. Newnham, 3 M. & S. 456.

(*g*) 14 East, 481. (*a*) MS. *penes me.*

opinion, that the ship was at the time of sailing unseaworthy within the knowledge of the assured. This want of knowledge, we have seen, in ordinary cases would be no answer, if the ship was in fact not seaworthy.

And, on the other hand, in the case of *Stewart* v. *Wilson*, (*b*) where the rules of an insurance association provided, that "the managing underwriters should survey each ship insured, in hull and materials, every year, without distinction, and order such stores and repairs as they might deem necessary, which stores must be got and repairs done, on due notice being given, otherwise the ship should not be insured." The policies were all to be time policies for a year: held that the effect of not complying with an order of the managing underwriters was, that the ship must be considered unseaworthy, and the policy of assurance which had before been made on her, void.

In the recent case, also, of *Parfitt* v. *Thompson and others*, (*c*) which was an action on a policy of insurance for a total loss, the declaration stated that the defendants agreed that the ship should be, and was thereby allowed to be, seaworthy in her hull, tackle, and materials for the voyage; the assured declar-
[*112] ing, that to the best of their belief, and according to *their knowledge and information, the ship, at the time of the insurance, was in all respects seaworthy for the voyage. It then alleged the making of the policy, and that during the voyage, by stormy winds and tempestuous weather, and by the force and violence of the winds and waves, the ship became leaky, strained, riven, and damaged, insomuch that, by means thereof, it became necessary for her preservation, for her to sail to the nearest port of safety: that she accordingly sailed to the nearest port of safety, to wit, the harbour of *Gambia;* that on her arrival at *Gambia* she was unfit to prosecute her voyage without being repaired and refitted; that she was found to be unseaworthy, and unfit to prosecute her voyage, unless great repairs were done upon her; that such repairs could not be done at *Gambia;* that it was not possible to obtain any repairs sufficient to enable her to proceed on her voyage, or to proceed to any other port to be repaired; that it became expedient and necessary to abandon the voyage and to sell the ship; and that the ship was sold, by means of which premises the voyage was not performed, and the vessel wholly lost to the plaintiff: held that, "whether the loss of the vessel was occasioned by unseaworthiness, or by the perils of the sea, the defendants were bound by their admission, and could not dispute the seaworthiness." Held, also, on motion, "that it sufficiently appeared by the allegations in the declaration, that the loss of the vessel was occasioned by the perils of the sea." These cases show that it is not unusual with associations of insurance, either to bind the underwriters to certain admissions, or to make the merchants adhere to certain rules: they are quite at liberty to do this, but they must bear the consequences of such stipulations. Private underwriters do not often, if at all, depart from the common form of the policy, except in the liberties and privileges which may suit the assured: as liberty to touch, to stay and trade, &c., in different forms; it is frequent, also, for the underwriters to insure the goods to the ship from the shore, which is not the usual form in the ordinary policy.

[*113] *And in a case of *Samuel* v. *Royal Exchange Assurance Company*, (*a*) tried before Lord *Tenterden* at the *London* Sittings after Trin. Term, 1827, where the loss happened to the ship in entering the dock at *Deptford*, his Lordship told the jury, that one question of fact was, whether persons of competent skill were employed to carry the vessel into the dock? If persons of competent skill were not on board, the defendants were entitled to the verdict.

(*b*) 12 M. & W. 11.
(*a*) 8 B. & C. 119.
(*c*) 13 M. & W. 392.

The captain, also, is, by the position of consequence in which he is placed by the owners, and by the confidence reposed in him by them, frequently called upon to exercise his judgment in cases of loss and insurmountable difficulties, and to act, according to his discretion, in the best manner for the benefit of all concerned.

In the case of *Milles* v. *Fletcher*, (*b*) which was an action on a policy of insurance on "a ship and her freight," the plaintiff went for a total loss. The defendant insisted that he was only entitled to recover for an average loss. The jury found a verdict for a total loss. The facts were that the ship and goods were captured on the 23d of *May*, by two *American* privateers, who took the captain, and all the crew, and part of the cargo (sugar) out of her; the rigging was also taken away. She was afterwards retaken, and carried into *New York*, where the captain arrived on the 23rd of *June*, and taking possession of her, found that part of what was left of the cargo was washed overboard; that fifty-seven hogsheads of what remained were damaged; and that the ship was leaky, and could not be repaired without unloading her entirely. Under these and other disadvantageous circumstances, he consulted with his friends at *New York*, and resolved, upon their opinion and his own, to sell the ship and cargo, as the most prudent step for the interests of his employers. The cargo was sold, and paid for. The ship was also contracted for, but the person who had agreed to buy her ran away, and the captain left her, and returned to *England* *in the *February* following, and gave the plaintiff notice of what [*114] had been done, which was the first notice he received of it; and the plaintiff immediately claimed for a total loss, and offered to abandon. Lord *Mansfield*, at the trial, told the jury, that if they were satisfied that the captain had done what was best for the benefit of all concerned, they must find as for a total loss, which they accordingly did. Upon a motion for a new trial, the unanimous opinion of the Court was delivered by Lord *Mansfield*, who said, in the course of the judgment, "when the assured first had notice, and offered to abandon, (which was when the captain came to *England*) and when the ship was brought to *New York*, it was still a total loss. The only answer the defendant makes, or can make to this is, that the loss was total indeed, but that the captain made it so by his improper conduct; for that on taking possession of the ship the loss became partial, and that he ought to have pursued the voyage. But is this defence true? The captain, when he came to *New York*, had no express order, but he had an implied authority, from both sides, to do what was fit and right to be done, as neither of them had agents in the place; and whatever it was right for him to have done, if it had been his own ship and cargo, the underwriters must answer for the consequences of it, because this was within his contract of indemnity."

In the case of *Shipton* v. *Thornton*, (*a*) Lord *Denman* says, "that it must never be forgotten, that the master acts in a double capacity—as agent to the owners as to the ship and freight, and agent to the merchant as to the goods: these interests may sometimes conflict with each other, and from that circumstance may have arisen the difficulty of defining the master's duty, under all circumstances, in any but very general terms. The case now put supposes an inability to complete the contract in its terms in another bottom, and therefore the owner's right to tranship will be at an end; but still, all circumstances considered, it may be greatly for the *benefit of the freighter that [*115] the goods should be forwarded to their destination, even at an increased rate of freight; and, if so, it will be the duty of the master, as his

(*b*) Dough. 231.

(*a*) 9 A. & E. 314.

agent, to do so. In such a case, the freighter will be bound by the act of his agent, and liable for the increased freight."

It is likewise required by law (*a*) that the master should take on board a pilot at those points in the voyage when the law bids him. Pilots are established at different places in *England*, by the authority of various charters and acts of Parliament; and, in general, the master of a ship engaged in a foreign trade must place the ship under the charge of such a pilot, both in the outward and homeward voyage, within the limits of every such establishment. (*b*)

There is a case of *Law* v. *Hollingsworth*, (*c*) of which only a brief notice will be requisite, inasmuch as the decision in that case is considered to be overruled by more modern authorities; the reader may, however, refer to the full report of the case, and judge for himself. The facts were simply these: A captain of a vessel entering the *Thames* took on board a pilot at *Orfordness*, who again quitted her at *Halfway Reach;* after which, and before she came to her moorings higher up the river, the accident happened which occasioned the loss. The captain, also, had left the vessel before the time of the actual loss. It further appeared that the pilot was not properly qualified at the time, according to the provisions of 5 Geo. 2, c. 20, for the regulations of pilots on the *River Thames;* but it did not appear that this fact was known to the captain; and the pilot had since received his regular qualification.

In the case of *Dixon* v. *Sadler*, (*d*) which we shall have to refer to at length in the course of this treatise, *Parke*, B., [*116] who delivered the judgment of that case, after deliberation by the Court of Exchequer, says (on the subject of the case of *Law* v. *Hollingsworth:*)—"The only case which appears to be at variance with the principle now laid down is the case of *Law* v. *Hollingsworth*, in which the fact of the pilot who had been taken on board for the navigation of the *River Thames* having quitted it before he ought, (under what circumstances is not distinctly stated) appears to have been held to have vitiated the policy. In this respect we cannot help thinking that the case must be considered as having been overruled by the modern authorities above alluded to. The great principle established by the more recent decisions is, that if the vessel's crew and equipments be originally sufficient the assured has done all he contracted to do, and is not responsible for the subsequent deficiency occasioned by any neglect or misconduct of the master or crew, or of the pilot as a temporary master. And this principle prevents many nice and difficult inquiries, and causes a more complete indemnity to the assured, which is the object of the contract of insurance."

When this case of *Dixon* v. *Sadler* was brought into a Court of Error, (*a*) Lord Chief Justice *Tindal*, who delivered the judgment, says, at the conclusion of it, "But, without entering into a futher discussion of the principle, we think, upon the later authorities, the rule is established, *that there is no implied warranty, on the part of the assured, for the continuance of the seaworthiness of the vessel, or for the performance of their duty by the master and crew, during the whole course of the voyage.* The case of *Law* v. *Hollingsworth* must be allowed to bear against the principle so laid down by those later authorities. The ground of decision in that case appears to have been, that there was no pilot on board during the time the ship was sailing up the

---

(*a*) See the case of "The Protector," 1 Dr. W. Rob. Ad. Rep. N. S. 45; and see the provisions of the General Pilot Act, 6 Geo. 4, c. 125; also the cases of M'Intosh v. Slade, 6 B. & C. 657; Bennet v. Moita, 7 Taunt. 258; Lucey v. Ingram, 6 M. & W. 302; Ritchie v. Bousfield, 7 Taunt. 309.

(*b*) See Abbott on Shipping, 6th edit. p. 173.

(*c*) 7 T. R. 160. (*d*) 5 M. & W. p. 415.

(*a*) 8 M. & W. 895.

Thames, which was required by 5 Geo. 2, and that there was an implied duty on the part of the assured that there should be such *a person. This, at least, appears to be the ground of Lord *Kenyon's* judg- [*117] ment, although, certainly, the other two Judges seemed to have considered that it was a loss arising from an act of gross negligence. The decision may be maintainable on the ground of an implied warranty to observe the positive requisitions of an act of Parliament; but if it is to be taken as an authority, that the implied warranty of the assured extends to acts of negligence on the part of the master and crew throughout the voyage, we think it cannot be supported against the weight of the later authorities.

"This case of *Law* v. *Hollingsworth*, appears not to apply to cases of the neglect of the master or pilot, if one has come on board, and the provisions of the General Pilot Act on this subject, seem to have done little more than to have confirmed and strengthened this principle of law. The pilot, when in charge of the vessel, stands in the place of the master; and the underwriters are no more discharged by his neglect than they are by the neglect of the master. In the case of *Carruthers* v. *Sydebotham*, (*a*) it was held, that where the ship was stranded by the neglect and fault of the pilot, the underwriters were not discharged; and the same principle one would naturally suppose would apply to the case where the pilot, having been once on board, leaves the ship sooner than he ought to do, either wilfully or by neglect. Now, bearing the provisions of the General Pilot Act in mind, let us see what would be the effect on the contract of insurance, if in any case where a pilot is required by law, or by the practice of navigation in any particular place, to take charge of the vessel, and no pilot can be obtained or ever comes on board. There can be no doubt that it is the duty of the master to use all possible endeavour to comply with this rule; and when he is leaving a port and has the means in his power, it would seem to be imperative on him not to sail without one. (*b*) But what is he to do if in approaching a port, he finds it impossible, either on account of the violence of the sea, *or any other insurmountable [*118] cause to procure one? Why in such a case the master must act to the best of his judgment—and supposing him to be a captain of competent skill, the case will fall within the plea of necessity, which in extremities in matters relating to insurances have always been allowed. And by the express provisions of the act above referred to, it is declared, that the underwriters shall not be discharged by reason of no pilot being on board, 'unless it shall be proved that the want of a pilot, or of a duly qualified pilot, shall have arisen from any refusal, or to take a pilot, or a duly qualified pilot on board, or for the wilful neglect of the master of such a vessel, in not heaving to, or using all practicable means consistently with the safety of such ship or vessel, for the purpose of taking on board any pilot, who shall be ready and offer to take charge of such ship or vessel.'" (*a*) And this enactment is in direct conformity with the principles of law laid down by Lord *Tenterden*, in the case of *Phillips* v. *Headlam*, (*b*) which was an action upon a policy of assurance, "at and from *Liverpool* to the ship's port or ports of discharge in *Sierra Leone*, and during her stay there, and from thence to her port or ports of discharge in the *United Kingdom*."

At the trial before *Bayley*, J., at the Summer Assizes for the county of *Lancaster*, 1829, it appeared that the ship sailed on the voyage insured, and arrived at three o'clock in the evening of the 30th *January*, off the river *Sierra*

(*a*) 4 M. & S. 77.
(*b*) Per Lord Tenterden, in Phillips v. Headlam, 2 B. & Ad. 383.
(*a*) 6 Geo. 4, c. 125, s. 56. (*b*) 2 B. & Ad. 383.

Leone, where there is a regular establishment of pilots; that the captain then hoisted a signal for a pilot, and at ten o'clock no pilot having come on board, the captain attempted to enter the river, and in doing so, the vessel struck the ground and was lost. It was proved that it was usual for vessels either coming out or going into the river, to take a pilot, and the defendant's evidence went to show, that it was not necessary or proper that the captain should enter the river without one. *Bayley*, J., told the jury to find for the plaintiff, if they [*119] thought that the captain in entering the harbour without a *pilot, did what a prudent man would do under the circumstances: otherwise for the defendant. The jury having found for the plaintiff, a rule *nisi* was obtained, on the ground that the verdict was against evidence. Lord *Tenterden*, C. J., "The rule for a new trial must be discharged. If the loss happened even in consequence of the mistake of the master, (provided he were a person of competent skill at the time when the policy was made) the underwriters are chargeable. The case was, therefore, left to the jury most favourably for the defendant; and, at all events, he will not be entitled to a new trial, unless it be on the ground that the master was bound by law not to enter the harbour without a pilot. It may be conceived that a vessel coming out of a harbour must have a pilot, because the master always has it in his power to procure one; but it seems to me that if the master of a vessel, arriving off a port, use due diligence to obtain a pilot he does all that is required by law. Here the vessel arrived off *Sierra Leone* about three in the afternoon: the captain hoisted signals for a pilot, and at ten no pilot had come off. It seems to me that upon the evidence, the master did use due diligence to obtain a pilot, and having done so, it was competent to him to exercise his discretion, whether it was better to run the risk of entering the harbour without one, or to wait for the following day for a pilot. Here, acting to the best of his judgment, he attempted to enter without one, and in doing so the vessel was lost: and I think the underwriters are liable for a loss happening under these circumstances." *Parke*, J.—"The rule of law is, that the assured is bound to have the ship seaworthy at the commencement of the risk. He is bound, therefore, to have a sufficient crew, and a master of competent skill and ability, to navigate her, at the commencement of the voyage: and if she sail from a port where there is an establishment of pilots, and the nature of the navigation requires one, the master must take one. So, if in the course of her voyage, the master arrives at a port or place where a pilot is necessary, he ought not to dismiss him before the necessity has ceased. But if a vessel sails to a port [*120] *where the establishment is such, that it is not always possible to procure the assistance of a pilot before the vessel enters into the difficult part of the navigation—then as the law compels no one to perform impossibilities, all it can require in such a case is, that the master use all reasonable efforts to obtain one. In another action on this policy, tried before me at *Lancaster*, at the Spring Assizes, 1830, I left two questions to the jury; first, whether by the law of usage of *Sierre Leone*, a pilot was required? and secondly, whether the captain made all reasonable efforts to obtain one, and not being able to do so, conducted himself as a man of reasonable care, prudence, and skill, ought to have done? The jury found a verdict for the plaintiff, which the Court on a motion for a new trial, refused to disturb." *Littledale*, J., concurred with the rest of the Court, and the rule was, therefore, discharged.

In the case of *Farmer* v. *Legg*, (*a*) the question was, whether the ship insured had been duly navigated in the manner prescribed by the stat. 31 Geo.

(*a*) 7 T. R. 186.

3, c. 54, s. 7. It was an action on a policy of insurance on *The Cadiz Dispatch*, on a voyage from *London* to the coast of *Africa*, and if the ship had not been navigated according to the statute in question, it was agreed that the insurance was void. The statute required that no person should take the command of an *African* ship, until he should have made oath, and produced to the officer of the customs, a certificate attested by the owner or owners, that he had already served in that capacity during one voyage, or as chief mate and surgeon during two voyages, under certain penalties. The Court were of opinion, that the certificate produced in the case signed by the then owner, did not comply with the requisition of the statute, that therefore the ship was not duly navigated, and confirmed the judgment of nonsuit against the plaintiff, which had, under Lord *Kenyon's* direction, been given at *Guildhall*.

*In a more recent case of *Suart and another* v. *Powell*, (*a*) [*121] which was tried before Mr. J. *Littledale*, at the Summer Assizes at *Lancaster*, 1829, and which was an action on a policy of insurance upon "the ship *Ardent* and freight," at and from *Sierra Leone*, or other the ship's ports or places of loading on the coast of *Africa*, to her final port of discharge in the *United Kingdom*. The insurance was made on the ship "*Ardent*," a British registered vessel of 245 tons burthen. She arrived at *Sierra Leone*, with a full and proper complement of men. The case turns on the terms of the Navigation Act, 6 Geo. 4, c. 109, which requires that certain ships shall be navigated by a crew, three parts of which are British. An exemption is given if a due proportion of such seamen cannot be procured in any foreign port, or any place within the *East India Company's* charter—or if the proportion be destroyed during the voyage by any unavoidable circumstance, and the master produce a certificate of the facts under the hand of a British Consul, or two known British merchants, if there be no Consul at the place where such facts can be ascertained; or in the want of such certificate if the master prove the facts to the satisfaction of the controller of customs in a British port, or of any person authorized in any other part of the world, to inquire into the navigation of such ship; it was held that the ship insured, which lost her proportion of British by death at *Sierra Leone*, and could not, at least upon any reasonable term, replace them, except with foreigners, was within the exception. And the vessel having been lost on her voyage home with an over proportion of foreign hands, it was further held that, although no certificate had been obtained pursuant to the act, the assured were not precluded from recovering against the underwriters, the circumstances of excuse being satisfactorily proved to a jury at the trial.

The case of *Wedderburn and others* v. *Bell*, (*b*) is an important case upon the present subject, as Lord Ellenborough *lays down the law [*122] respecting the extending of the principle of implied warranty to the soundness of the *sails* and *rigging*, as well as to the sufficiency of the *hull*. It was an insurance upon "goods" on board the *Minorca*, at and from *Jamaica* to *London*, at a premium of ten guineas, to return 5 per cent. if the ship sailed from the place of "rendezvous with convoy for the voyage and arrived." The ship sailed for *England* with convoy in the end of *July*, and parted from the fleet on the 12th *August*, and was never more heard of, whence she was supposed to have foundered. The defence rested on two grounds: first, that she was not properly equipped with sails: and, secondly, that she had not a sufficient crew. It appeared in evidence, that the sails which were used in stormy weather were in good condition, but that her maintopgallant sails and studding sails, which are useful in light breezes, were extremely

(*a*) 1 B. & Ad. 266. (*b*) 1 Camp. 1.

rotten, and almost quite unserviceable. The evidence about the state of the crew was contradictory. Lord *Ellenborough*.—"In an action of this kind, the plaintiffs are bound to prove, not only that the ship was tight, staunch and strong, but that she was properly equipped with *sails and other stores*, and that *she was manned with a sufficient crew to navigate her on the voyage insured*. These are conditions precedent to the policy attaching, and if they were not complied with, so that the perils were enhanced, from whatever cause this might arise, and though no fraud was intended by the assured, the underwriters have a right to say they are not liable. The *hull* of the ship, in this case, was *sufficient* and *seaworthy*, but it appears that when she left *Jamaica* her *sails* were *highly defective*. It is not enough that a ship is supplied with such sails as are essential to her safety from the perils of the sea, and which might enable her, if not intercepted, from at some period or other, completing her voyage. A person who underwrites a policy upon her, has a right to expect that she will be so equipped with sails that she may be able to keep up with the convoy, and get to the place of her destination with reasonable expe-
[*123] dition. She must be *rendered as secure as possible from capture by the enemy, as well as from the danger of winds and waves; but here the *Minorca* appears to have been *deficient* in *sails*, on which her loss might materially depend: and if so, the risk being thereby greatly increased, the policy never attached, and this action cannot be supported." His Lordship also thought, that upon the balance of the evidence the crew were insufficient. The defendant obtained a verdict. (*a*)

But although, by an implied warranty, every ship insured must be "seaworthy" for the voyage at its commencement, still the assured makes no warranty that she shall continue so. In the case of the *Earl of March* v. *Pigot*, (*b*) Lord *Mansfield* (the case of the *Mills Frigate* being mentioned at the Bar) says, "The assured ought to know whether his ship was 'seaworthy' or not when she set sail on the voyage insured; but how should he know the condition she might be in after she had been out a twelvemonth?" And his Lordship again, in the case of *Eden* v. *Parkinson*, (*c*) confirmed this doctrine by observing, "By an implied warranty every ship insured must be tight, staunch and strong; but it is sufficient if she be so at the time of her sailing: she may cease to be so in twenty-four hours after her departure, and yet the underwriter will continue liable. And in *Watson* v. *Clarke*, (*d*) which was an appeal from *Scotland* to the *House of Lords*, it was stated to be a clear and established principle, that if a ship be seaworthy at the commencement of the risk, though she becomes otherwise in an hour from that time, the warranty is complied with and the underwriter liable."

Neither does the assured, after having provided a sufficient crew and master of competent skill at the commencement of the voyage, make any warranty that they shall do their duty during the continuation of it, nor are the underwriters discharged from their liability in the case of a loss immediately caused
[*124] by one of the perils insured against, although remotely *owing to the negligence of the master or crew. This important principle of the law of insurance will be treated of more fully in the further course of this Treatise, though it will also discover itself in what has to follow in this section. We have, likewise seen, that it is recognized in the case of *Phillips* v. *Headlam*, (*a*) where the Court held it to be clear, that on the supposition that the master was a person of competent skill, yet if he acted *bonâ fide*,

(*a*) See Wilkie v. Geddes, *ante*, p. 107. (*b*) 5 Burr. 2808.
(*c*) Doug. 732. (*d*) 1 Dow. 336, *ante*, p. 106.
(*a*) 2 B. & Ad. 380, *ante*, p. 118.

though erroneously, in entering a port without a pilot, the underwriters would nevertheless not be discharged.

In the recent case of *Dixon* v. *Sadler*, (*b*) to which we have already referred, this doctrine was fully discussed and recognized by the Court of Exchequer, and their judgment was afterwards confirmed on a writ of error. (*c*) It was an action on a time policy on the *John Cook*, and cargo, at and from the 17th of *January*, 1838, at noon, in port and at sea, at all times and in all places, being for the space of six calendar months. The declaration averred the loss of the ship to have taken place on the 19th of *May*, 1838, by perils of the sea. Plea,—"That, though true it is that the said vessel was by the sea wrecked, broken, damaged, and injured, and became and was wholly lost to the plaintiffs, for plea, nevertheless, the defendant says, that the said wrecking, breaking, damaging, and injuring the said vessel, and the loss of the same by perils of the sea, as in the first count mentioned, was occasioned wholly by the wilful, wrongful, negligent, and improper conduct (the same not being barratrous (*d*)) of the master and mariners of the said ship, whilst the said ship was at sea, and before the same was wrecked, broken, damaged, injured, or lost, as therein mentioned, by wilfully, wrongfully, negligently, and improperly (but not barratrously) throwing overboard so much of the ballast of the said ship, that by means thereof she became and was top-heavy, crank, unfit to carry sail, and wholly unseaworthy, *and unfit and unable to endure and encounter the perils of the sea, which she might and would [*125] otherwise have been able to have safely encountered and endured, and by means and in consequence of the said wilful, wrongful, negligent, and improper (but not barratrous) conduct of the said master and mariners, the said ship became and was wrecked, &c."

At the trial, before *Parke*, B., at the Spring Assizes for *Northumberland*, it appeared that the vessel left *Rotterdam* for *Sunderland*, properly ballasted and equipped, on the 15th of *May*, and arrived on the 19th opposite a point called *Seaham*, about four miles from the port of *Sunderland*. On arriving there, and having a pilot on board, the master commenced heaving part of his ballast overboard, as was proved to be usual on such occasion. Whilst this was going on, the vessel drifted to the northward, and a strong squall coming on from the south-east, the ship was upset on her broadside, and her masts lay in the water. Every endeavour was made to right her, but in vain. She afterwards sunk, drifted on shore, and became a total wreck. If the crew had not removed the ballast, the ship would most likely have stood the squall. His Lordship left two questions for the jury. First, was it negligent conduct to throw ballast overboard before arriving in the harbour? Secondly, did they think the master exercised a reasonable discretion in throwing it overboard?

The jury found that they did think it negligent. Secondly, that the master did right, supposing the practice authorized him. A verdict was therefore entered for the defendant, the plaintiff having leave to move to enter a verdict. After argument at the Bar, the judgment of the Court was subsequently delivered by *Parke*, B.—"The plea, in its present state, raises the question, whether the underwriters are liable for the wilful, but not barratrous, act of the master and crew in rendering the vessel unseaworthy, before the end of the voyage, by casting overboard a part of the ballast. We have considered it, and are of opinion that the plea is bad in substance, and that the plaintiff is entitled to judgment, notwithstanding the verdict. The question depends alto-

---

(*b*) 5 M. & W. 405. (*c*) 8 M. & W. 890.

(*d*) These words were added in the plea during the argument by the suggestion of the Court.

[*126] gether upon the nature *of the implied warranty as to seaworthiness or mode of navigation between the assured and the underwriter on a time policy. In the case of an insurance for a certain voyage, it is clearly established that there is an implied warranty that the vessel shall be in a fit state as to repairs, equipment, and crew, and in all other respects to encounter the ordinary perils of the voyage at the time of sailing upon it. If the assurance attaches before the voyage commences, it is enough that the state of the ship be then commensurate with her present risk; and if the voyage be such as to require a different complement of men or state of equipment in different parts of it, as if it were a voyage down a canal or river, and thence across to the open sea, it would be enough if the vessel were, at the commencement of each stage of the navigation, properly manned and equipped for it. But the assured makes no warranty to the underwriters that the vessel shall continue seaworthy, or that the master or crew shall do their duty during the voyage; and their negligence or misconduct is no defence to an action on the policy, when the loss has been immediately occasioned by the perils insured against. This principle is now clearly established by the authorities, nor can any distinction be made between the omission by the master and crew to do any act which ought to be done, or the doing an act which ought not, in the course of the navigation. It matters not whether a fire, which causes a loss, be lighted improperly, or, after being properly lighted, be negligently attended; whether the loss of an anchor, which renders the vessel unseaworthy, be attributable to the omission to take proper care of it, or to the improper act of shipping it, or cutting it away; nor could it make any difference whether any other part of the equipment was lost by mere neglect, or thrown away or destroyed, in the exercise of an improper discretion by those on board. If there be any fault in the crew, whether of omission or commission, the assured is not to be responsible for its consequences. The great principle established by the recent decisions is, that if the vessel, crew, and equipments be originally sufficient, the assured has done *all he contracted to do, and is not responsible for the subsequent deficiency occasioned by any neglect or misconduct of the master or crew, and this principle prevents many nice and difficult inquiries, and causes a more complete indemnity to the assured, which is the object of the contract of insurance. The only remaining point is whether the circumstance of this being a time policy makes a difference. There are not any cases in which the obligation of the assured in such a case, as to the seaworthiness or navigation of the vessel, is settled; but it may be safely laid down that it is not more extensive than in the case of an ordinary policy, and that if there is no contract for the conduct of the crew in the one sense, there is none in the other. (*a*) Here it is clear that no obligation arises on the ground of the unseaworthiness of the vessel, until that unseaworthiness was caused by the throwing overboard a part of the ballast by the improper act of the master and crew, and as the insured is not responsible for such improper act, we are of opinion that the plea is bad in substance, and that the plaintiff is entitled to our judgment."

[*127]

The general rule, however, that a ship must be seaworthy at the commencement of her voyage, or the underwriters are discharged, seems to admit of this proper qualification, that, if a ship, by mistake or accident, has sailed out of port in an unseaworthy state, and this fact is discovered before any loss has occurred, and the defect is remedied, and she then proceeds in a seaworthy condition, the underwriter will be liable for a subsequent loss. This was held in the case of *Weir* v. *Aberdein*. (*b*) It appeared that ship sailed from *London*,

(*a*) That there is no distinction in this respect between a time policy and a policy for a voyage, see Hollingworth v. Brodrick, 7 A. & E. 47.

(*b*) 2 B. & A. 320.

on her voyage, on the 18th of *March*, laden with iron, and that between *Dungeness* and *Beachy Head* she laboured so much that it became necessary to put back to the *Downs*, from whence she sailed again on the 27th, but she still laboured so as to make it necessary to bear up again for the *Downs*, *where she arrived on the 30th. The plaintiff (who was [*128] both captain and owner) made a protest, and came up to *London*, to consult with the charterer about unloading part of the cargo. On his arrival he informed his insurance-broker that it would be necessary to put into some port to unload part of the cargo. The broker applied to the underwriters, and a memorandum, signed by the defendant, was indorsed on the policy to this effect:—"It is agreed that the *Prince Coburg* may load, unload, and reload goods, and discharge part of her cargo at *Ramsgate*;" but he did not communicate the fact, that the ship had put back from *Beachy Head*, or that a protest had been made. The plaintiff, on his return to *Deal*, had the ship surveyed, and, under the advice of the surveyors that it was necessary to lighten her, he put into *Ramsgate* harbour, and unshipped part of the cargo. He then proceeded on the voyage insured, in the course of which the loss took place. It was objected, on the part of the defendant, that the ship, having been overladen, was unseaworthy at the commencement of the voyage, and that the memorandum was invalid from having been obtained without making a due communication to the underwriters.

The jury found, that when the ship sailed from *Ramsgate* she was then in a seaworthy state, and that the subsequent loss was not in any degree attributable to the circumstance of her being overladen between *London* and *Ramsgate*. And the verdict was entered for the plaintiff. Upon the motion for a new trial, *Abbott*, C. J., said:—"It is said that this memorandum, expressing the consent of the underwriters, is void, and that, in order to bind the underwriters, a new contract was necessary, inasmuch as the fact of the vessel having once sailed with a cargo greater than was proper for that voyage, and therefore in an unseaworthy state, wholly put an end to their liability on the policy. That proposition would go the length of establishing, that if a vessel, at the outset of her voyage, be by mistake or accident unseaworthy, owing to some defect, which is immediately discovered and remedied before any loss happens in consequence of it, still that the *policy would be [*129] void, and the underwriters not liable. I confess that I was a little surprised at that proposition, because, if true in point of law, I fear we should find many cases indeed where it would turn out that the assured could have no claim upon the underwriter, because something was wanting, or something excessive, at the instant of the ship's departure, although the want had been supplied, or the excess removed before the loss happened. Suppose, for instance, a vessel is unseaworthy, unless she has two anchors, being destined for a long voyage, and she sails from *London* to *Gravesend* with only one, shall it be said that if no loss happens between *London* and *Gravesend*, and the vessel at *Gravesend* takes in her second anchor, and then proceeds on her voyage, that the underwriters are not liable for a subsequent loss, and that the policy is so completely at an end that, even if the underwriters agree to waive the objection, and to allow her to proceed on her voyage, their consent shall be unavailing? These inconveniences, which would be continually occurring in practice, would lead to dangerous consequences, by opening a door to underwriters to break their engagements by means of trivial circumstances, the effect of which no one ever contemplated. I think, therefore, that that proposition cannot be maintained. With respect to the sufficiency of the communication made to the underwriters, it is quite clear that the underwriters were told all that was in substance necessary for them to know; for they were told that the vessel, when she sailed, had too large a cargo on board, and that she was not in a situation fit to

perform her voyage. Upon the whole, therefore, I think this rule must be refused." The rest of the Court concurred.

That the implied warranty of the seaworthiness of a ship has a reference only to her condition at the commencement of the risk, and does not extend to any other period of the voyage (except in those instances where something is to be done, as the taking on board of a pilot in the usual course of the navigation,) there can be no doubt. But some question may arise whether the [*130] assured, in case the ship becomes unseaworthy *in the course of the voyage, and the fact comes to his knowledge, and she can by reasonable care and diligence be rendered seaworthy, is not in such a case bound to repair her, and whether, in his failing to do that, and a loss arises in consequence, the underwriters would not be discharged from their liability. It appears, however, very clear that the fact must come to the knowledge of the assured, for the implied warranty extends only to the commencement of the voyage, when the assured is bound to know whether the ship is seaworthy or not. This question came before the Court of King's Bench, in a recent case of *Hollingworth* v. *Brodrick*. (*a*) But, inasmuch as the Court held that the plea was itself defective, they found it unnecessary to pronounce any direct decision upon the principal question in the case. As, however, the leaning of the minds of the Judges present may be gathered from what fell from them on the occasion, I shall briefly refer to the case in question.

It was an action on a time policy for twelve calendar months upon any kind of goods and merchandises, and also upon the body, &c. of the ship *Augustine*. The declaration stated that "during the said twelve calendar months, and whilst the said ship was attempting to prosecute a voyage which was protected by the said policy, to wit on, &c., the said ship was by the perils and dangers of the sea, and by stormy and tempestuous weather, and the violence of the winds and waves broken, damaged, spoiled, and destroyed, and the said ship thereby became and was wholly lost to the plaintiff." Plea. "That after the making of the said policy in the said declaration mentioned, and during the said time the said ship or vessel was insured as therein mentioned, and before the loss as in the declaration mentioned, the said ship or vessel was greatly broken, damaged, shattered, loosened and unseaworthy; but the same by and with reasonable care and diligence in that behalf, and at and for a very small cost and sum as compared with the value of the said ship or vessel, might [*131] and could and ought to have been by the said plaintiff repaired, *amended, and rendered seaworthy: yet the said plaintiff, well knowing the premises, did not nor would repair, amend and render the said ship seaworthy, but wholly neglected and refused so to do; and she so remained and continued in such unseaworthy state and condition until the time of the loss in the said declaration mentioned." To this plea the defendant demurred.

Lord *Denman*, C. J.—"The defence of unseaworthiness is generally applied to the time when the risk commences; that is not done here, nor is the loss stated to have happened in consequence of the unseaworthiness supervening. I own I feel a doubt, whether, if it were distinctly averred that the ship had by gross negligence been brought, during the voyage, to a condition in which she would not be insurable that would not be a defence. It is certainly a new, and perhaps a dangerous one; but I think that, if it were clearly made out, the assured could not say that the loss was by perils insured against. The case, however, is not such here. In the first place it is not distinctly averred that the plaintiff knew the precise danger, for the words "knowing the premises" do not amount to such an averment. And secondly, it is not

(*a*) 7 A. & E. 40.

said that, except for gross negligence the ship might have been restored to a seaworthy state before the loss actually happened. The averment that with "reasonable care" the ship might have been repaired and rendered seaworthy, does not show there was gross negligence in not doing so. Therefore, even supposing the law to be as I at first suggested (which I have some doubts of, from the novelty and dangerous nature of the defence,) it cannot apply here; and the plaintiff is entitled to judgment."

Patteson, J.—"The defence is put entirely on the fact that the ship, during the voyage, "was unseaworthy." It is not stated that she became so through neglect, to repair from time to time, and that that occasioned the loss. I do not know that that would have been a defence. But it is only said that by some means the ship was greatly damaged. It is clear that the implied warranty of seaworthiness is satisfied if *the ship be seaworthy at the commencement of the risk. I do not know of any distinction on [*132] account of the risk being for time. Unseaworthiness, for want of a particular description of crew is an exception to the rule, because one crew may be necessary for one part of the voyage, and another for another. That case is different from the case of unseaworthiness owing to something in the condition of the vessel. Even if it could be contended that a default of the owner, after the commencement of the voyage, might be set up in the manner here attempted, I should say that the loss ought to be traced to that, because the defence is no longer rested on the implied warranty, but is something actually done by the owner. Here the endeavour is to make the implied warranty extend to every period of the voyage where the owner could do anything for the ship, making him responsible, even though the loss be not caused by his omitting any of these things. There is no authority for such a position. The plea is loosely drawn, even according to the defendant's view of the case. It should have stated that the plaintiff was aware of the unseaworthiness, and that there was time for repairing before the loss happened: and, supposing that in the case of a time policy, the assured was held to a warranty of seaworthiness, at the commencement of each voyage during the time, the allegations should have been shaped accordingly. But I wish to go upon the broad ground, that no warranty of seaworthiness is to be implied, except at the commencement of the voyage."

There is, indeed, an implied warranty on the part of the assured that a loss shall not occur through his own default, and therefore it was held in the case of *Pipon* v. *Cope*, (*a*) that, when through the negligence of the owner of a ship insured, the mariners barratrously carried smuggled goods on board, whereby the ship was seized as forfeited, the underwriters were not liable for the loss. Lord *Ellenborough* there says, "this is a clear case of *crassa negligentia* on the part of the assured. It was the plaintiff's duty to have pre- [*133] vented *these repeated acts of smuggling by the crew. By his neglecting to do so, and allowing the risk to be so monstrously enhanced, the underwriters are discharged." And the learned reporter of this case adds, "The supineness of the plaintiff in this case may be considered as a breach of an implied warranty on the part of the assured to use reasonable care and diligence to guard against all the risks covered by the policy." (*a*) And in an after-part of this work we shall see that if the assured navigates against the laws of the country in which he happens to be, he shall not recover for any loss arising out of such misconduct, for this is a gross fraud on the part of the owner of the property insured, and no man shall take advantage of his own wrong. (*b*)

(*a*) 1 Camp. 434.
(*a*) See Law v. Hollingsworth, 7 T. R. 160, *ante*, p. 45.
(*b*) See 2 Vern. 176, *post*.

And in the case of *Boyd* v. *Dubois*, (*c*) which was an action on a policy on some hemp, and the loss was alleged to be "by fire," Lord *Ellenborough* said, "If the hemp was put on board in a state liable to effervesce, and it did effervesce, and generate the fire, upon the common principles of insurance the assured cannot recover for a loss which he has himself occasioned. But I must positively say that they were not bound to represent to the underwriters the state of the goods, it would introduce endless confusion and perpetual controversies if such a duty was to be imposed upon the assured."

Inasmuch, as the implied warranty of the seaworthiness of the ship is an essential ingredient in the contract entered into between the assured and the underwriter, it would, consequently, be irrelevant to the contract to make any representation of the condition of the ship, because that is entirely dispensed with by the underwriter, he having his remedy in his own hands. In a case of *Shoolbred* v. *Nutt*, (*d*) which was an action on a valued policy of insurance upon the ship *Two Sisters*, and a cargo of wheat and wines from *Madeira* to *Charlestown*; the ship had sailed from *London* *to *Madeira*. [*134] The assured, who was the owner of the cargo, ordered his broker to procure an insurance from *Madeira* for the voyage to *Charlestown*, which was accordingly done; but he did not communicate to the broker or the underwriters two letters which he had received from his captain the day before he made the insurance, stating that the ship had arrived at *Madeira*, but was very leaky, and that the pipes of wine had been half covered with water. But it was proved at the trial, that the leak had been completely stopped before she sailed from *Madeira*, and of course, before the commencement of the risk insured. In her voyage to *Charlestown* she was taken, and the plaintiff abandoned. Lord *Mansfield* told the jury "that there should be a representation of every thing relating to the risk, which the underwriter has to run, except it be covered by a warranty. It is a condition or implied warranty in every policy that the ship is seaworthy, and, therefore, there need be no representation of that. If she sailed without being so, there is no valid policy. Here the leak was stopped before she sailed from *Madeira*, and she sailed in good condition from thence; and there is no occasion to state the condition of a ship or cargo at the end of her former voyage." There was a verdict for the plaintiff.

And upon the authority of this case, and the reason of the thing; it was declared, in the case of *Haywood* v. *Rogers*, (*a*) after time taken to deliberate, that the assured having impliedly warranted his ship to be seaworthy, and having concealed no circumstance relative to the seaworthiness which he was required to disclose, and not having at the time of making the insurance, known of any fact which rendered her with reference to the risk insured, otherwise than seaworthy, was entitled to recover.

The doctrine established by the laws of this country is not confined to it, but exists as well in all the maritime countries in Europe. By the *Code de* [*135] *Commerce*, every *ship is to be visited previous to her setting sail on her voyage, and a report is to be made of the condition in which she is found. A modern writer (*a*) on this subject says:—"L'article 225, en prescrivant au capitaine d'un navire de commerce le devoir de faire visiter son navire avant de prendre charge, aux termes et dans les formes prescrits par les reglements, prescrit aussi aux visiteurs de déposer le procès

(*c*) 3 Camp. 132.
(*d*) Sit. at Guild. after Hil. 1782. Park Ins. 493.
(*a*) 4 East, 590.
(*a*) See "Memoire à consulter sur le legalite de la visite des navires, par un membre de l'ancienne commission libre du port d'Anvers." Anvers, 1841.

verbal de visite au greffe du tribunal de commerce, où il en est délivré extraite au capitaine. Cette visite a évidemment pour but de constater l'etat du navire, de s'assurer s'il est à meme de soutenir la navigation, s'il est muni de tout ce qui lui est nécessarie pour le voyage qu'il doit faire; elle se fait avant de prendre charge afin qu'on puisse recognaître l'etat du navire tant a l'interieur qu'à l'exterieur." And the same writer, speaking of the *Code de Commerce Belge*, adds:—"Dans ce noveau code, l'art 15, livre 2, titre 3, droit remplacer l'article 225, du *Code de Commerce* encore en vigeur; cet article portait: 'avant de prendre charge pour un voyage à l'exterieur, le capitaine est tenu, à la requisition et aux frais de toutes les personnes y ayant intéret, de faire éxaminer par les exports jurés, établis à cet effet ou nommés par le juge, si son navire est pouvu de tout ce qui est nécessaire, et se trouve en etat de faire le voyage!" (*a*)

In the ordinances of Louis the Fourteenth, (*b*) it is declared, that decay, waste, or loss, which happen from the internal defect of the insured ship shall not fall upon the underwriter. A commentator upon these ordinances, has gone into the reason and principle of such a regulation, and has shewn the propriety of it. (*c*) He sets out by observing, that this doctrine is of a date as ancient as the period when the French treatise called "*Le Guidon*" was published, which was about the year 1661; at which time, as appears by a reference to the book itself, it was considered as a settled principle, [*136] *that losses happening from causes of this nature, were not to be a charge on the underwriter. (*a*) The same author has also shewn, that such a provision is adopted in favour of the assurers by the ordinances of *Rotterdam* and *Amsterdam*. (*b*) After stating these circumstances, he proceeds to say, that when a ship is deemed incapable of finishing her voyage, the question whether this event is a charge upon the underwriters depends upon another, viz:—whether it happened by the violence of the sea, or other fortuitous circumstances, or whether the disability proceeds from age and rottenness. (*c*) This will be determined by the inquiry which was made before the departure of the ship, in order to judge whether it was in a condition to perform the voyage or not; if the latter was the case, the assurers ought not to answer. In another part of this work, he declares that the indemnity will be void, even though the ship has been examined before her departure, and declared capable of performing the voyage; since the event has clearly shewn, that on account of latent defects it was no longer navigable; that is, if it were proved that the parts of the ship were so rotten, weakened and destroyed, that she was not in a proper state to resist the ordinary attacks of wind and sea, inevitable in every voyage, then the underwriters are discharged. The reason is, that the examination before departure extends only to the external parts, because she is not unripped: at least, not so as to discover the interior and latent defects, (*d*) for which the owner or master of the ship continues always responsible, and that with the greater justice, because they cannot be wholly ignorant of the bad state of the ship; but supposing them to be so, it is the same thing, being indispensably bound to provide a "good" ship, able to perform the voyage. (*e*)

(*a*) See "Memoire á consulter sur le legalite de la visite des navires, par un membre de l'ancienne commission libre du port d'Anvers." Anvers, 1841.

(*b*) Ord. of Louis 14th. tit. Insurance, art. 12.

(*c*) 2 Val. 80.

(*b*) 2 Val. 90, 140.

(*a*) C. 5, art. 3.

(*c*) 2 Val. 81.

(*d*) 1 Val. 654. See per Lord Eldon, in Douglas v. Scougall, 4; Dow. 269, *ante*, p. 106.

(*e*) See Roccus, note 98, upon the doctrine of implied conditions, and see how agreeable the above doctrine is to the decisions in the cases already quoted of Lee v. Beach; Munro v. Vandam, and some others.

[*137] *The opinon of this learned commentator is supported by two of his countrymen of the greatest note, on subjects of this description, viz: *Pothier* and the great *Emerigon.*

It is interesting, as well as instructive, to observe from the opinions of the learned *Valin* in the passages just quoted, how the notions of the early foreign writers, and the rules, regulations, laws, and ordinances of foreign maritime states in ancient times coincide in so remarkable a manner with the settled decisions of the Courts of Justice of this country upon this ancient and interesting subject of contract. This similarity can have sprung up between them only by the fact of the earlier administrators of the law of this country looking for information and guidance in such subjects to the writings of these learned men who have left behind them so many proofs and monuments of their great industry and researches: and also it is reasonable to suppose that this accordance between the ancient system of rules, and the more late body of law which has been by degrees made on the subject in this country, may well enough be as much owing to the effect which the great learning, and splendid talents, and acute powers of reasoning on the principles of the subject have in each case (both by the English lawyers and the foreign jurists) out of the same materials formed a structure in no very great degree differing the one from the other. Thus Lord *Mansfield* himself expresses himself in his judgment in the case of *Pelly* v. *The Royal Exchange Assurance Company.* (*a*)

His Lordship says, "from the nature, object, and utility of this contract, consequences have been drawn, and a system of construction established upon the ancient and inaccurate form of words in which the instrument is conceived. The mercantile law in this respect is the same all over the world. For from the same premises the sound conclusion of reason and justice must be universally the same."

[*138] And Lord Chief Justice *Denman*, in the recent case of *Shipton* v. *Thornton*, (*b*) (which has been alluded to before, *and will presently be mentioned again more fully,) says that a question which was for the present consideration of the Court, "must turn upon the nature of the contract between the parties, as it is to be collected from our own books, and from those foreign laws and ordinances, as well as the writings of jurists to which our country have long been accustomed to have recourse for guidance on subjects of this nature."

We have now considered under the present head of this subject, what was meant by the term "good," as applied to the "ship," and have mentioned most of the authorities, as well those of our Courts of Law as the opinions which are to be gathered from learned and foreign writers, which have fixed and settled the rules and laws which are binding on the assured for the benefit of the assurers in respect to the "sufficiency" and "goodness" of the bottom upon which they have hazarded their risks, and shewn, we trust, most clearly, that this protection of the underwriters consists almost exclusively in the assumption by the law, that in every instance, where the assured and the underwriter enter into the contract of insurance on "ship," or the "goods on board," for it comes to the same thing, for if the ship be not "good" and "sufficient," the goods insured are lost by its defects, that in every instance, where a policy of insurance is made, there is at that moment (without any expressed agreement) an implied warranty on the part of the assured that the ship be seaworthy, "tight, staunch and strong" for the voyage insured; that the ship, likewise, be properly equipped with sails and other stores, fit for navigating the ship for the voyage in question; that she have a sufficient crew,

(*a*) 1 Burr, 347. (*b*) 9 A. & E. 314.

and a master, of competent skill, to navigate her: and I may conclude now this subject in the words of Mr. J. *Lawrence*, who says "the consideration of the insurance is paid, in order that the owner of a ship which is capable of performing her voyage may be indemnified against certain contingencies; and it supposes the possibility of the underwriter's gaining the premium: but if the ship be incapable of performing the voyage, there is *no possibility of the underwriter's gaining the premium—and if the consideration fail, the obligation fails." [*139] At the same time it is to be borne in mind, for the encouragement and satisfaction of the assured, that all the law requires of them is to perform their part of the contract strictly, as to the implied warranty, which they have, previous to the voyage, the power in their own hands to do, if they choose; the law then exempts them from any further responsibility, whatever may happen, because there was a *bonâ fide* contract made by the assured, and the law will not be too captious in the event of loss, to find reasons for discharging the assurers from paying to the insured an indemnity for their loss.

But their still remains a further subject for our consideration on this head of "the good ship, &c.," without which it would not be possible to leave it in a complete state of illustration. The remaining part of the subject relating peculiarly to the "ship," to which I allude, is that which treats of the law respecting the "changing of the ship," which is an additional duty cast upon the assured, which has not yet been touched upon. It was stated at the beginning of this section that in order to make the insurance effectual, it was essential that the name of the ship should be stated in the policy, and that with the exception of a case or two where the ship had been named by mistake, and the identity proved, it was held to be sufficient: and although the policy contains these words, "or by what other name or names the ship may be called," and that in some special cases insurances have been held to be good, and no doubt are when made upon "ship or ships" coming from and expected to arrive at a certain port. This being so, generally speaking, the assured cannot substitute another vessel for the one named in the policy at the time of making the insurance, for the underwriter by such change has lost the advantage of ascertaining the character of the ship substituted for the one first offered to him, to underwrite, and has had no opportunity to exercise his judgment respecting it, as well as the premium he shall expect to receive; and if another were to start on the voyage *different to the one he understood to be the subject of the insurance, this alters *in toto* his speculation about the insurance, and consequently he will not, by law, be bound by his contract, which is now invalid: inasmuch it relates to a different matter to which he had agreed, because the contract he entered into with the assured was for the protection of certain "goods" on board a particular ship, or on "the particular ship itself," and it is clear that he cannot, in case of a loss arising, be held to his contract, which has without his knowledge or consent been entirely made a different one to that which he had underwrote. This reasoning, as a general theory, seems to admit of no doubt whatever, applying as it is supposed to the change of the vessel before the commencement of the voyage. But whether in the case of a transhipment rendered absolutely necessary in the course of the voyage, and made by the master in due and proper execution of his duty, the underwriter shall be considered as still continuing liable, and whether likewise for extra expenses attending the transhipment as an increase of freight, does not appear to have met with any express decision by the Courts in this country, though by the regulations of other countries the question appears to have been settled. It is certain that by the contract between the shipowner and the freighter, the shipowner (and the master as his agent) is bound to carry the goods to their destination, if not prevented from doing so in his own ship, by some event [*140]

which he has not occasioned, and over which he has no control. "The master," says Lord *Tenterden*, in his book on *Shipping*, (*a*) "should always bear in mind, that it is his duty to convey the cargo to the place of destination. This is the purpose for which he has been entrusted with it, and this purpose he is bound to accomplish by every reasonable and practicable method." Many bad consequences, no doubt, might arise from relaxing this rule, by holding out temptation to the shipowner or master to make unnecessary transhipment of
[*141] goods, whereby the goods themselves run the *risk of damage, and the policy of insurance may become questioned. But Lord *Denman*, in a recent case of *Shipton* v. *Thornton*, (*a*) says, "that after all, these inconveniences seem to point to a vigilant examination of every case of transhipment to see that its necessity is well established, rather than to decide the present question: and that this must turn upon the nature of the contract between the parties, as it is to be collected from our own books, and from those foreign laws and ordinances, as well as the writings of jurists, to which our Courts have long been accustomed to have recourse for guidance on subjects of this nature."

His Lordship then observes, "that there seems to be much disagreement in foreign ordinances and jurists whether or no the master is bound to tranship, or whether having contracted only to carry in his own ship, he is not absolved from further prosecution of the enterprize by the *vis major* which prevents him from accomplishing it in the literal terms of his undertaking."

I propose, in the first place, to refer to the opinions and writings of learned jurists upon this important question, and to some of the ordinances and laws of other maritime and commercial states.

Malyne, in his *Lex Mercatoria*, (*b*) appears to be of opinion that the assured may, for a sufficient reason, shift the goods from one ship to another, so as to be delivered according to the charter-party, and the underwriter will continue liable, for he says, "It sometimes happens that upon some special consideration, this clause, forbidding the transferring of goods from one ship to another, is inserted in policies of insurance, because in time of hostility or war between princes, it might be unladen in such ships of contending princes, by which the adventure would be increased. But according to the usual policies, which are made generally without an exception, the assurer is liable thereunto: for it is
[*142] understood that the master of a ship would not, *without some good and accidental cause, put the goods from one ship to another, but would deliver them according to the charter-party at the appointed place." The late Mr. J. *Park* observes upon this passage, in his own treatise, (*a*) "that the reason given by *Malyne* in support of his position, is by no means satisfactory, nor is it well founded in point of experience: neither has he adduced a single authority to corroborate the opinion advanced. Indeed," he says, "the whole current of authority turns the other way, at least as far as I have been able to trace it." *Molloy* has said, that if goods are insured in such a ship, and afterwards in the voyage she becomes leaky and crazy, and the supercargo and the master, by consent, become freighters of another ship for the safe delivery of the goods, and then after she is loaded the second vessel miscarries, the assurers are discharged. It is true, the sentence proceeds thus: "If these words be inserted, namely, the goods laden to be transported and delivered at such a place by the said ship, or by any other ship or vessel until they be safely landed, the assurers must answer for the misfortune."

This opinion is confirmed by foreign writers. *Roccus* writes, "Merces si eâdem navigatione transferantur de unâ navi in aliam, et si novissime navis ubi

---

(*a*) Page 321, 6th edit.
(*b*) Mal. Lex. Merc. 118.
(*a*) 9 A. & E. 314.
(*a*) Park Ins. 613.

merces tranfusæ fuerunt, deperdater, tunc est inspicienda forma assecurationis, in quâ, si fuit dictum, quod assecurator merces quæ sunt in tali navis tunc assecurator non tenetur, eo quod mentionem fecit in assecuratione de tali navi. Et ratio est, quia non par est ratio assecurationis, quando merces devehunter in unâ navi et quando in alterâ, *immo solet id principaliter considerari inter* ipsos assecuratores cum una *navis sit magis fortis quam alia.*" (*b*)

Roccus is corroborated by several foreign writers (*c*) upon this branch of jurisdiction, which seems so contrary to good policy, and calculated to make the master and crew quit the vessel and let her be lost, the consequence of which must *invariably fall on the assurers in the shape of a total loss. And we shall afterwards see that a clause is inserted in the [*143] usual policies, that the assured, their factors, servants, or assigns, may sue, labour, and travel for, in and about the defence, safeguard, and recovery of the said goods and ship, &c., without any prejudice to the insurance, and it must be clear, in cases where it is possible, the readiest mode to save the property would be transferring it to another bottom, to the charges of which, the clause goes on to say, they (the assurers) undertake to contribute each in proportion of his sum insured therein.

But it appears that from the following authorities, in case of necessity, the master is at liberty to tranship, where the transhipment can only be made at a higher rate of freight, and by the *French* law it becomes an average loss, and in the case of insurance must be borne by the underwriters.

By the *Rhodian* law, (*a*) the laws of *Oleron*, (*b*) and the ordinances of *Wisbuy*, (*c*) the master was at liberty but not bound to tranship.

By the old *French* ordinances the master was obliged to do so. "En cas que le vaisseau ne puisse este racommodè, le maistre sera obligè d'en louer incessamment un autre." (*d*)

Upon these ordinances it was maintained, however, by *Pothier* (*e*) and *Valin*, (*f*) that it was imperative upon the master; *Emerigon*, (*g*) on the other hand, insisted that the duty was cast upon him as the agent of the freighters: and the same view is adopted by the modern *French* Code. (*h*)

By the *French* ordinances (*i*) and the *Code de Commerce*, *and according to the decisions in America, the shipowner is entitled to [*144] charge the cargo with the increased freight, and in the case of insurance it must be made good by the assurers. (*a*)

And Lord *Tenterden*, in his book on *Shipping*, (*b*) adopts this principle, and refers to the ordinances of *Antwerp* and *Rotterdam*, and other authorities, and says, "If by reason of the damage done to the ship, or through want of necessary materials, she cannot be repaired at all, or not without great loss of time, the master is at liberty to procure another ship to transport the cargo to the place of its destination." The question in the case of *Shipton* v. *Thornton*, (*c*)

(*b*) Roccus de Assec. No. 28.
(*c*) Santerna de Assecur. n. 35. Stracca and others, n. 10.
(*a*) Pardessus Collection de lois Maritimes, tom. 1, p. 256, c. vi, s. 42.
(*b*) Id. tom. 1, p. 325, c. viii. art. 4. (*c*) Id. tom. 1, p. 472, c. xi, art. 18.
(*d*) Liv. iii. tit. iii.
(*e*) Œuvres, tom. 2, p. 394, ed. 2, (1781.) Contrats de Louages Maritimes, part 1, Charter-partie, 1, s. 3, art. 2, 93, num. 68.
(*f*) Nouveau Commentaire sur l'Ordinance de la Marine, lib. iii., tit. iii., (Du Fret ou Nolis,) art. ii. (tom. 1, p. 651, ed. 1766.)
(*g*) Traité des Assurances, tom. i, p. 423, ed. 1827, ch. xii, s. 16.
(*h*) Liv. ii, tit. 8. (*i*) Emer. Traité des Assur. c. xii. s. 16.
(*a*) Code de Commerce, 350; and Chancellor Kent's Comment, 3 Com. 212.
(*b*) Abb. part 4, c. 4, p. 320, 6th edit. (*c*) 9 A. & E. 314.

to which I have alluded, was whether, where goods shipped under a bill of lading in a general ship, which was prevented from completing the voyage in consequence of damage occasioned by tempest, the master was bound, if he had an opportunity, to forward the goods by some other conveyance to their place of destination, and the Court of Queen's Bench held that he was, at any rate, at liberty to do so at the same rate of freight; and that if the goods arrived at their place of destination by such other conveyance, the shipowner was entitled, on the freighter receiving the goods, to the whole of the freight originally contracted for, although by the second conveyance the goods were carried at a lower rate of freight." The reader is referred to the very elaborate judgment delivered by Lord Chief Justice *Denman*, in which the opinions of the foreign jurists, and the laws of foreign countries, are fully laid down by the Court. In giving judgment on this case. it was unnecessary for the Court to give any opinion as to what the effect would be if the transhipment could have been made only at a higher rate of freight, neither did it pass any opinion on the effect this would have had on the contract of insurance. Lord *Denman* says, "It must never be forgotten, that the master acts in a double capacity: as agent to *the owner, as to the ship and freight, and agent to the merchant as to the goods; these interests may sometimes conflict with each other, and from that circumstance may have arisen the difficulty of defining the master's duty under all circumstances, in any but very general terms. The case now put supposes an inability to complete the contract, in its original terms, in another bottom, and therefore the owner's right to tranship will be at an end; but still, all circumstances considered, it may be greatly for the benefit of the freighter that the goods be forwarded to their destination even at an increased rate of freight, and if so, it will be the duty of the master as his agent to do so. In such, the freighter will be bound by the act of his agent. and, of course, for the increased freight."

[*145]

And this, according to the French ordinances, and the rule in *America* would, we have already seen, have to be borne by the underwriters in the case of an insurance.

Besides this case of *Shipton* v. *Thornton*, which, though not containing a decision on the subject of insurance, may throw a little light upon it, should such a case of insurance arise under similar circumstances, and at any rate the authorities quoted by the Court have gone a long way to negative what Mr. J. *Park* says in his *Treatise on Insurance;* as far as his researches had gone, the amount of authorities leant against the principle and policy of transhipment in case of necessity: (*a*) there are two other cases only that are to be found in our books; and the first is the case of *Dick* v. *Barrell*, (*b*) and Mr. J. *Park* again says "this case is not expressly in point, though it seems to decide it." (*c*) It was an action on a policy of insurance which was tried before Lord Chief Justice *Lee*, at Guildhall. The plaintiff had insured "interest or no interest" in any ship he should come in from *Virginia* to *London*. Beginning the adventure on his embarking on board such ship; the money to be paid though his person should escape, or the ship be retaken. He embarked in the **Speedwell;* but she springing a leak at sea, he went on board the *Friendship*, and arrived safe in *London;* but the *Speedwell* was taken after he left her. And now in this action against the underwriters, the latter was held liable: for the insurance is on the ship the plaintiff set out in, and had that got safe home, and the other been lost, he could not have recovered upon the ground of his having removed his person into that ship in the middle of the voyage.

[*146]

(*a*) Park Ins. 613.
(*b*) 2 Strange, 1248.
(*c*) Park Ins. 617.

The next case is that of *Plantamour* v. *Staples*, (*a*) which is quite in point, to shew that where a transhipment had taken place into a second ship, the assured were held entitled to recover an average loss when the second ship was afterwards captured, and with all her cargo since condemned. The plaintiffs were merchants at *Geneva*, and on their own account and risk, by means of their agents at *Marseilles*, were interested in bullion, and goods, and merchandises shipped there on board the ship *Duras*, consigned to the plaintiffs' correspondents at *Pondicherry*, with directions to barter or sell the same on their account, and to make the returns on the same to *Europe* in other goods, the produce or manufacture of *India*. The plaintiffs were also interested in the said ship *Duras*. The ship *Duras* sailed from *France* on the voyage insured in *June*, 1776; and in the outward bound voyage was by bad weather totally lost at the Isles of *France*, in *April*, 1777. The goods on board sustained damage, but great part of the bullion, and a considerable part of the goods were saved, and without any authority from the underwriters, sent forward in another ship to the plaintiffs' correspondents at *Pondicherry*, who received and disposed of the same, and under the plaintiffs' orders invested the produce in other goods, the produce or manufactory of *India*, and shipped the same on the plaintiffs' account on board a ship called the "*Pere de Famille*," bound to *France*. The *Pere de Famille* sailed from *Pondicherry* in *August*, 1778, and in the course of her voyage, was *condemned at the *Isles of* [*147] *France*, as unfit to proceed to *Europe;* whereupon the plaintiffs' goods were put on board another ship, called the "*Louisa Elizabeth*," bound for *France:* which ship, with the plaintiffs' goods on board, sailed for *France*, and was afterwards taken by an English privateer, and has since, with all her cargo, been condemned. On the 29th *August*, several of the underwriters on the policy signed a memorandum thereon, whereby they agreed to run the risk on the goods saved as aforesaid, in any other "ship or ships," until their safe arrival in *France:* but which agreement the defendant and several others of the underwriters refused to sign, or give their consent to it. The defendant hath paid the whole of the average loss, occasioned by the loss of the ship *Duras*, and by the damage of the plaintiffs' goods then on board. By the capture of the ship *Louisa Elizabeth*, and of the goods, the plaintiffs sustained a loss of 12*l.* 2*s.* 9*d.* per cent. on the sum subscribed on the said policy, which has been paid by all the underwriters who signed the memorandum of 29th *August*, 1778. The question for the opinion of the Court was, whether the defendant was to pay the said loss of 12*l.* 2*s.* 9*d.* per cent. which the plaintiffs had so sustained by the capture and condemnation of the ship *Louisa Elizabeth* and her cargo; or if not, are they entitled to any, and what return of premium? Lord *Mansfield*—"There is not a particle of doubt. The only question is, whether the shipping to *Europe* was necessary to the salvage. It is admitted that the defendant is liable upon the voyage to *Pondicherry*, though the goods were conveyed in another ship: therefore that circumstance makes no difference. The sale of the cargo is also admitted to be necessary. Then how were the proceeds to be admitted to *Europe?* What was the best way of getting home the money for the benefit of the assured and assurers? Beyond all doubt the best way was to invest it in other goods. Therefore, that being done which was the best to be done, the underwriters are liable." *Buller*, J.—"There is no case which expressly decides that the captain may invest the *produce of the goods saved." But in the case of *Mills* [*148] v. *Fletcher*, (*b*) it was decided, that the captain has a general power, and is bound, in duty, to do the best for all concerned. Postea to the plaintiffs.

(*a*) M. 22 Geo. 3, B. R. 1 T. R. 611, note (*a*), 3 Doug. 1.
(*b*) Doug. 231.

I may venture to make an observation, with respect to this case, and the previous one of "*Shipton* v. *Thornton*," in which Lord *Denman* says, "the captain is agent for the owners of the goods, as well as of the owner of the ship in respect to ship and freight, and therefore it would appear probable that had there been a question in the latter case respecting an assurance, after a loss had happened of the second ship, and of the goods into which they had been transhipped, in the same manner as in the case of *Plantamour* v. *Staples*, the underwriters would be liable, on the principle 'that the master's duty called upon him to do every thing that was the best for all concerned.' "

SECTION VI.

BEGINNING THE ADVENTURE UPON THE SAID GOODS, ETC.

THE head of this sixth section includes that portion of the policy which states the time at which the risk commences both on the said "ship," and the said "goods" laden on board, and when they end, viz: "Beginning the adventure upon the 'said goods and merchandises,' from the loading thereof aboard the said ship, at , upon the said ship, &c. , and so shall continue and endure during her abode there upon the said ship, &c. And further, until the said ship, with all her ordnance, tackle, apparel, &c., and goods and merchandises whatsoever, shall arrive at , upon the said ship, &c., until she hath moored at anchor in good safety, and upon the goods and merchandises, until the same be there discharged and safely landed."

[*149] In most of the commercial countries abroad it is *particularly expressed, either in their ordinances or in the policies, "that the risk of the assurers shall commence the moment the goods quit the shore," and the assurers not only run the risk in the ship named in the policy, but also in the boats and lighters that shall be employed in carrying the goods on board. The custom is said to be different in this country: for the *English* policies expressly declare that the adventure shall begin upon the goods "from the loading thereof on board the said ship." This is the usual form in the printed policies used by private underwriters; but every underwriter, if he chooses, may take upon himself the risk of the goods from the shore to the ship. I believe that it is not at all rare, with respect to companies, and in cases of voyages to the *East Indies* or *China*, where there is difficulty in putting valuable goods on board safely. I have met with, in declarations on policies, many instances, and I have no doubt on the practice; but it all depends upon the words used whether the risk to the ship is to be as well as from the ship.

There is a very recent instance of this in the case of *Sutherland* v. *Pratt*, (*a*) (which has been referred to often, (*b*)) which was an insurance made by the plaintiff with the *General Maritime Assurance Company*, "at and from *Bombay* to *London*, with leave to call at all ports and places, on either side and at the *Cape of Good Hope*, including the risk of craft to and from the vessel, upon any kind of goods," &c.

I will mention another instance in the important case of *Roux* v. *Salvador;* the declaration is at length reported in Mr. *Scott's* Reports. (*c*) "The case

(*a*) 11 M. & W. 297.
(*b*) *Ante*, pp. 12, 33.
(*c*) 4 Scott, 1.

(upon the writ of error from the Common Pleas) stated that the action was on an insurance on goods, *per* the *General La Fayette*, and other 'ship or ships,' at and from, among other ports or places in the *Pacific Ocean*, *Valparaiso*, to any port or ports in *France* and the *United Kingdom of Great Britain*, with leave to touch and trade at any place in *America*, or anywhere else, to make all transhipments, and including the *risk of craft to and from the vessel or vessels." And I have little doubt that in this country the [*150] insertion of this clause by the assurers, in the case of companies is not at all rare. At all events, with regard to the conclusion, it appears in all cases to preserve the same form, viz: "and shall continue till the goods are safely landed." And so, where ships cannot come close to the quay to unload, the underwriters are liable for the risk of the goods being carried in boats to the shore. The risk upon the body of the ship is "at and from, &c. , upon the said ship, and so shall continue and endure until the said ship shall arrive at, &c., , and hath there moored at anchor twenty-four hours in good safety." (*a*)

When the insurance is made, indeed, on the homeward voyage, the beginning of the adventure is sometimes stated to be "immediately from and after her arrival at the port abroad;" at other times, "from the departure;" and, in short, it depends entirely upon the inclinations of the assured expressed in the contract.

And when the words "at and from" a given place are used in a policy of insurance, the risk is always understood to commence from the time of the ship's first arrival at that place. And in an action upon an insurance before Lord C. J. *Hardwicke*, it was held that the words "at and from *Bengal* to *England*," meant the ship's first arrival at *Bengal;* and it was agreed that, when such words are used in policies, first arrival is always implied and understood: (*b*) and the commencement of the voyage is sailing from port. (*c*)

The *first* class of cases to which I shall refer on this "head" are those upon which the Court have put a construction upon the attaching of the policy, and of the commencement and duration of the risk.

The first case to be mentioned is an anonymous one, (*d*) in the reign of James the Second, but is from a reporter of *very good authority. A policy of insurance shall be construed to run until the ship shall [*151] have ended, and be discharged of her voyage; for her arrival at the port to which she was bound is not a discharge, till she is unloaded. And it was so adjudged by the whole Court, upon a demurrer.

This decision may be very proper in a case so general as this, but in all instances where the usual clause is adopted, "and till the ship shall have moored at anchor in good safety," the underwriter on the "ship" would continue liable for accidents at the port no longer than "the twenty-four hours." With respect to the continuation of the risk upon the goods, which the underwriters undertake to be answerable for till the said goods be safely landed, by many foreign ordinances the number of days in which the assured are to unload their goods is stipulated; but in this country there is no such stipulation: the owners of the goods being left to take them away at their discretion, so long as there is no unreasonable delay; some cargoes, no doubt, will take more time to unload than others.

In the case of *Noble* v. *Kennoway*, (*a*) where goods insured to the coast of *Labrador*, "till safely landed," they were kept on board a long time after the

(*a*) 1 Magens, 47. (*b*) 1 Atk. 548.
(*c*) Graham v. Barras, 5 B. & Ad. 1011. (*d*) Skinner, 243.
(*a*) Doug. 510.

ship's arrival—this being the "usage" of the trade at that place—the risk continued.

It has been observed above, that where the ship cannot come near the quay in order to unload, in such cases the underwriters must continue liable for the risk of carrying the goods in boats to the shore. But in a case of *Sparrow* v. *Carruthers*, (*b*) where the owner of the goods brought down his own lighter, and received the goods out of the ship, and before they reached land an accident happened, whereby the goods were damaged, a special jury of merchants, under the direction of Lord Chief Justice *Lee*, found that the underwriters were discharged, although the insurance was upon "goods to *London*, and till the same shall be safely landed there."

[*152] *But when there is an "usage," in a particular trade, to take the goods on shore in public lighters, the underwriters were held liable for an accident which happened to the goods on board the lighter. This was the decision in the case of *Hurry and others* v. *Royal Exchange Company*. (*a*) And in the case of *Stewart* v. *Bell*, (*b*) where the goods insured were destined to a particular place in an island, and the usual course was for the ship to proceed to an adjoining port, and there tranship the goods into the *shallops*, but no information was given of this circumstance to the underwriters, it was held that they were liable for a loss which happened to the goods after they had been put on board the *shallops*. And in the case, also, of *Mathie* v. *Potts*, (*c*) which was an insurance of goods on board, from *Nassau* to *Campeachy* and back, "till discharged and safely landed," the ship having sailed to *Campeachy*, and having arrived off that port, made signals for launches to come out, into which the goods were put for the purpose of being run ashore: the Court thought the goods were protected by the policy, while on board the launches, such being the "usual" method of carrying on that trade.

But where in the case of *Strong* v. *Natally*, (*d*) goods had been put on board a lighter in the usual way, and brought to a wharf belonging to the plaintiff in the afternoon, but in consequence of the roughness of the weather could not be landed that evening; the lighterman, finding he could not land the goods, asked the plaintiff whether he should stay to see the cargo landed. The plaintiff said he need not do so, for he would see to the landing himself. Accordingly the lighterman left the cargo alongside the wharf. In the course of the night, the lighter was sunk, by unavoidable accident, and the goods were lost. The Court held that "the underwriters were discharged, the plaintiff having

[*153] taken the goods into his own possession before they were landed, *having the complete control over them, and renounced all benefit under the policy."

When the policy is on "the ship," I have observed, (*a*) with the usual clause, "till the ship shall have moored at anchor twenty-four hours in good safety," the underwriters will not be liable for any loss which takes place after the expiration of the twenty-four hours. This principle of law, was settled by a case of *Lockyer and others* v. *Offley*, (*b*) which was an action on a policy of insurance on "the ship *Hope*, from *Hamburgh* to *London*." At the trial before Mr. J. *Buller*, at *Guildhall*, the verdict was found for the plaintiff, subject to the opinion of the Court upon the following case: "that the plaintiffs were interested in the ship to the amount of the sum insured, that the master had in the course of the voyage committed barratry by smuggling on

---

(*b*) 2 Strange, 1236.
(*b*) 5 B. & A. 238.
(*d*) 1 N. R. 16.
(*b*) 1 T. R. 252.
(*a*) 2 B. & P. 430.
(*c*) 3 B. & P. 23.
(*a*) *Ante*, p. 151.

his own account, by hovering and running brandy on shore in casks under sixty gallons: that on the 1st *September*, 1785, the ship arrived in safety at her moorings in the river *Thames*, and remained there in safety till the 27th of the said month of *September*, when she was seized by the revenue officers, for the smuggling before stated: about three weeks after the seizure, the plaintiffs informed the underwriters thereof; and that they would hold them liable on the policy: that on the 20th *October*, the plaintiffs presented a petition to the commissioners of his Majesty's Customs, in which the whole blame (which was the truth) attached to the captain, and praying that their vessel might be restored on paying something to the seizing officer. The answer was "that the prosecution must proceed, as the ship had been guilty of a gross violation of the laws, but the owners should be at liberty to compound according to the rules of the *Exchequer:*" that the ship was appraised at the sum of 330*l.*, and by the course of the Court of *Exchequer* the ship would have been restored to the plaintiffs upon payment of 230*l.*, besides costs and charges, which would altogether *have amounted to 329*l.* 9*s.* 7*d.*: that in [*154] *November*, a notice was indorsed on the policy, binding the underwriters for all costs and charges about the recovery of the ship: that this was shown to the underwriters who refused to subscribe it. This case was fully argued in the absence of Lord *Mansfield*, and the Court having taken time to consider it, Mr. J. *Willes* pronounced their unanimous opinion, "the general question here is, whether as the loss, which was occasioned by the barratry of the master, did not happen during the continuance of the voyage, the underwriters are liable? I must own this appears to me a novel case, and not to have been decided by any former determinations. Difficulties occur on both sides in laying down any rule. The first thing to be observed is, that the policy by the terms of it, is an undertaking for a limited time, during the voyage from *Hamburgh* to *London*, till the ship has moored twenty-four hours in safety, and the ship was not actually seized till nearly a month afterwards. But it has been said, that under the 24th Geo. 3, c. 47, and the Excise laws, that the forfeiture attaches the moment the act is done, and that the barratry was committed during the voyage. It may be so as to some purposes, as to prevent alterations or incumbrances; but I think the actual property is not altered till after the seizure, though it may be before condemnation. I will put this case: suppose, before the seizure of the ship she had gone another voyage, and on her return had been seized, would the crown have been entitled to an account of her earnings after deducting the expenses of the outfit? Surely not. Till the seizure, it was not certain that the officers of the Crown knew of the illicit trade of the master, or whether they would take advantage of the forfeiture. It would be a dangerous doctrine to lay down, that the underwriters should, in all cases, be liable to remote consequential damages. This has been compared to a death's wound, which subjected the ship to a subsequent loss. To this, the case of *Meretony* v. *Dunlop* (*a*) seems very material: that *was "an insurance on a ship for six months," and three days [*155] before the expiration of the time she received her death's wound, but by pumping was kept afloat till three days after the time; there, the verdict, under the direction of Lord *Mansfield*, was given for the underwriter, and that verdict was afterwards confirmed by the Court. I will put another case: suppose an insurance upon a man's life for a year, and a short time before the expiration of the year, he receives a mortal wound, of which he dies after the year, the insurer would not be liable. It was also argued that this ship, even in the hands of a fair purchaser, would be liable to the forfei-

(*a*) Easter, 23 Geo. 3, B. R.

ture. I do not know that it has ever been so decided; it may depend upon circumstances, such as length of possession, laches in seizing, or other matters. But suppose the law to be so, it does not follow from thence, that though the ship is always liable to confiscation, that the underwriter, at any distance of time, is answerable for the loss under a limited undertaking. And this brings one to that part of the case which weighs most with the Court in favour of the defendant, and to which it does not think that any satisfactory answer has been given. It was agreed in the argument, that the Custom-house officers might seize for the forfeiture within three years after the fact committed; and the Attorney General might file an information at any time while the ship was in being. Is the underwriter during all this time to continue liable? Suppose the ship had gone several voyages afterwards; and suppose a partial loss paid, and the underwriter's name struck off, shall an action be afterwards brought upon the policy? His accounts could never be settled, nor could be finally discharged, whilst the ship was in existence: such a position would be monstrous, and attended with infinite inconvenience. There must be some limitation in reason, in point of time laid down by the Court, when the underwriter shall be released from his engagement. If he be liable for a month, he is for a year, and so on. We all think that the law of insurances would be left unsettled, and in much confusion, if any other time than *prescribed by the policy, namely, the continuance of the voyage, and the mooring twenty-four hours in safety."

[*156]

Judgment for the defendant.

In the case of *Shaw* v. *Felton*, (*a*) which was an action on a policy of insurance "on the ship *Indian*, and goods, at and from *Liverpool* to the coast of *Africa*, during her stay and trade there, and from thence to the port or ports of discharge, sale, and final destination in the *West Indies* and *America*, and until she was moored twenty-four hours in safety." She arrived on the coast of *Africa*, took in a cargo of slaves, and proceeded to *Demerara*. In the course of her voyage, and in calm weather, she met with a violent concussion, resembling an earthquake, from which she received so much damage that it was with the greatest difficulty that she could be kept afloat by pumping, till she reached *Demerara*, almost a wreck, when she was obliged to be lashed to a hulk to prevent her sinking, and in attempting to remove her from thence to the shore a few days afterwards, she sunk, though the distance was only fifty yards. The plaintiff gave notice of abandonment to the underwriters, and recovered as for a total loss of the ship. On the rule for a new trial, Lord *Kenyon*, C. J., said,—"The jury had no doubt but the ship was seaworthy when she sailed, and that there was a total loss: for, although she arrived at *Demerara*, she never was moored twenty-four hours in safety. She came there a perfect wreck, having received her death's wound at sea, and was with the greatest difficulty kept afloat till all the people were landed." The distinction between this case and the preceding seems to be this, that although both ships may be said equally to have received their death wound at sea, in the latter case the loss was at once appreciable upon her immediate arrival, so as to prevent her even being said to be moored in safety, while, in the former case, the consequences which made the loss were very remote, and were not ascertained at her arrival.

*In the case of *Waples* v. *Eames*, (*b*) the ship *Success* was insured "at and from *Leghorn* to the port of *London*, and till there moored twenty-four hours in good safety." She arrived the 8th of *July* at *Fresh Wharf*, and moored, but was the same day ordered back to the *Hope*

[*157]

(*a*) 2 East, 108. (*b*) 2 Strange, 1243.

to perform a fourteen days' quarantine. The men upon this deserted her, and on the 12th the captain applied to be excused going, which petition was adjourned to the 28th, when the regency ordered her back: and on the 13th she went back, performed the quarantine, and then sent up for orders to air the goods; but before she returned, the ship was burnt on the 23rd *August*, and now the question was, whether the underwriters were liable? Lord Chief Justice *Lee* decided, that though the ship was so long at her moorings, yet she could not be said to be there in good safety, which must mean the opportunity of unloading and discharging; whereas here she was arrested within twenty-four hours, and the hands having deserted, and the regency having taken time to consider the petition, there was no fault in the master or owners; and it was proved, that till the fourteen days were expired no application could be made to air the goods, whereupon the jury found for the plaintiff.

So in the case of *Minett* v. *Anderson*, (*b*) where the ship *Hercules* was insured "from *Bilboa* to *Rouen*, and till twenty-four hours moored in safety there;" the ship arrived, an embargo having been previously laid on all English vessels in that port. The captain went on shore the day he arrived, and the next day the embargo was laid on his ship. He was afterwards permitted to land his goods, which he delivered to his consignees, but the ship was detained as a prize, and the captain and crew allowed subsistence as prisoners of war from the time of their arrival. Lord *Kenyon:* "She was as much within the power of the enemy, as if a guard had been put on board the moment she arrived. She could not be said to be twenty-four hours or a minute moored in safety, so far as relates to these plaintiffs, for immediately on her [*158] *entering the port, she was, to all intents and purposes, captured by the French." Verdict for the plaintiffs.

So in the case of *Horneyer* v. *Lushington*, (*a*) immediately upon the arrival of the ship at *Riga*, her papers were taken and hatches sealed down, by order of the government, till her papers could be sent to *St. Petersburgh* to be examined, after which the ship, &c., were condemned for carrying simulated papers: the Court held this vessel could not be said "to be moored in good safety," and the underwriters would have been liable; but as the assured carried simulated papers without leave, the assured could not recover.

But in the case of *Angerstein* v. *Bell*, (*b*) where a ship had arrived at the wharf where she intended to unload, on the 12th *January*, and was laid on the outside of the tier, there being no room to lay her in the inside, where the sails were unbent, topmasts struck, three anchors out, and was also lashed to another ship, and so continued till the 19th, when ships and a quantity of ice drove athwart her stern, forced her adrift, and she was wholly lost. Lord *Kenyon* was of opinion, that she was completely moored on the 12th, and as the accident did not happen till above twenty-four hours after that time, the plaintiff was nonsuited.

So, in the case of *Samuel* v. *Royal Exchange Company*, (*c*) where an insurance was made on a ship from *Sierra Leone* to *London*, "to begin at *Sierra Leone* and endure upon the ship until she shall have arrived in *London*, and hath there moored at anchor twenty-four hours in good safety, and upon the 'goods' until the same be there discharged and safely landed," the ship arrived in the evening of the 18th *February*, and the captain having orders to take her into the King's Dock, at *Deptford*, moored her near the dock gates. On the following morning he was informed at the dock that no order for his admittance had been received, but that if it had, the vessel could not enter the dock on

(*b*) Peake, 211.
(*b*) Sit. at Guild. after Trin. Term, Park Ins. 54.
(*c*) 8 B. & C. 119.
(*a*) 15 East, 46.

[*159] account of the ice. *The order was sent by the Navy Board on the 21st, but on account of the ice, the ship could not be moved till the 27th, and then in warping her towards the dock, a rope broke, she grounded, and was totally lost. The jury found that the vessel remained at her moorings from the 18th *February* to the 27th, on account of the ice, and not for want of an order to enter the dock: it was held that the plaintiff was entitled to recover, for that the place where the vessel was moored was not the place of her ultimate destination, the policy did not expire when she had been there twenty-four hours in safety: and as the vessel remained at these moorings on account of the ice, and not waiting for the order, the underwriters were not discharged by the delay.

When a policy is upon freight "at and from a given place," the time at which the policy attaches seems to be regulated by the following principles. Generally speaking, the risk commences from the time the goods are put on board: and unless there be a contract for the shipment, or a charter of affreightment, the assured can only recover in respect of the freight of those goods which are on board at the time of the loss, both in the case of an open and valued policy; though in the case of *Montgomery* v. *Eggington* (*a*) which was the case of a valued policy, and a portion only of the goods were on board, but the remainder ready on the quay, the assured recovered for the whole value in the policy. In *Curling* v. *Long*, (*b*) *Eyre*, C. J., says, "The inception of freight is breaking ground. In the law of insurance, indeed, this doctrine is not holden so strict, for there, if the goods be so situated as to create a well grounded expectation of freight being raised, it is decided that the freight is insurable and recoverable." The principle which appears to be deducible from the authorities on this subject, to enable the assured to recover on a policy on freight, in cases where the goods are not actually on board, is, that there must be a contract for the shipment of the goods, the vessel in a condition to receive them,

[*160] and the goods ready to *be put on board, and the owners be prevented by one of the perils insured against from earning the freight. The first case on this subject is that of *Tonge* v. *Watts*, (*a*) in which case, though the cargo was ready to be put on board, the ship was not in a fit state to receive it, nor does it appear that there was any contract for the shipment.

The circumstances of the case were these:

The plaintiff insured on ship and freight at and from *Jamaica* to *Bristol*. A cargo was ready to be put on board; but the ship being careening, in order for the voyage, a sudden tempest arose, and she and many others were lost. The rigging and parts of her were recovered and sold, and the defendant paid into Court as much as, upon an average, he was liable to for the loss of the ship: but the plaintiff insisted to be allowed 600*l.* for the freight the ship would have earned in the voyage, if the accident had not happened. But as the goods were not actually on board, so as to make the plaintiff's right to freight commence, Lord Chief Justice *Lee* held he could not be allowed it, and he was nonsuited.

But if the policy be a valued policy, and part of the cargo be on board when such accident happens, the rest being ready to be shipped, the insured may recover to the whole amount. This was so decided in the case of *Montgomery* v. *Eggington*, (*b*) in an action brought by the assured on a policy on freight, valued at 1500*l.*: in fact, only 500*l.* worth of freight was on board, when the ship was driven from her moorings and lost; but goods to the amount of the rest of the freight were ready to be shipped, and were lying on the quay for that purpose at the time.

(*a*) 3 T. R. 362.
(*a*) 2 Strange, 1251.
(*b*) 1 Bos. & Pull. 636.
(*b*) 3 T. R. 362.

Lord *Kenyon*, Chief Justice, before whom the cause was tried, told the jury, that the question for their consideration was, whether this was a mere colourable insurance and a gaming policy? or whether it was a *bonâ fide* transaction? If the latter, the assured was entitled to recover for the whole value in the policy. The jury found for the whole sum. The defendant's counsel obtained a rule for a new *trial, which he afterwards abandoned, the Court being strongly of opinion against him. [*161]

In commenting upon this case, Lord *Ellenborough*, in *Forbes* v. *Aspinall*, (*a*) says, "The grounds of this decision do not appear: whether it proceeded upon a distinction between valued and open policies is not expressly stated; and it might be, that upon an open policy in such a case, Lord *Kenyon* and the Court might have thought the assured would have been entitled to recover in respect of the freight of the goods on shore, as well as for the freight of those that were actually put on board. There might be circumstances in that case which would have entitled the shipowner to full freight, had the owners of the goods on shore refused to let them be shipped, and the ship had sailed with that part only which she had on board: there might have been a contract for giving the ship a full loading, or it might have been considered (though it is difficult to suppose it was) that as the residue of goods to complete a cargo was ready to be shipped, and lying in the quay for the purpose, it was the same to the assured as if they really had been shipped. If that case, however, is to be considered as having decided, that upon a policy estimating the freight upon a full cargo at 1500*l.*, a loss by a peril insured against may be recovered to that extent, when a third only of a cargo is obtained, and freight to the amount of such third could only have been earned, and when it was uncertain whether more could ever have been procured: we should pause long before we allowed ourselves to adopt such a ground of decision: we should hesitate extremely before we should say that 1500*l.*, the calculated amount of the whole intended risk, should be paid for the loss of 500*l.* incurred in respect of a third of the intended risk; in other words, that a total loss should be paid for a loss of *only one-third* of that which the parties to the insurance contemplated as the *whole subject insured.*"

So likewise in the case of *Patrick* v. *Eames*, (*b*) which was *an action on a policy of insurance on the freight of the ship *Jane*, [*162] valued at 4000*l.*, "at and from the ship's port or ports of loading in all or any of the *Cape de Verd Islands* to *Liverpool.*" The *Jane* was purchased at *Sierra Leone* by Messrs. *Taylor* and *Waldron*, in whom the interest was averred: their plan was that she should take in a complete cargo of orchella weed. They expected that this would be supplied by *Don Emanuel Martinus*, the governor; it was suggested that he had verbally undertaken to do so, but there was no evidence of any binding agreement. The ship arrived at *St. Nicholas* on the 10th of *August*, 1812, and took in one hundred and fifty bags of orchella weed. The next day a storm came on, and she was totally wrecked. It did not appear that there was more orchella weed then ready to be put on board: but there were persons employed in *St. Nicholas* and the other islands to pick and prepare what should be a sufficient quantity to fill the ship. The defendants paid into Court sufficient to cover the freight of the one hundred and fifty bags. It was contended, on the authority of *Montgomery* v. *Eggington*, that the plaintiff was entitled to recover for a total loss. Lord *Ellenborough*, "If a contract had been proved for supplying the ship with a full cargo at a stipulated rate of freight, it would have appeared, that by the event which has happened the assured would have been deprived of a profit

(*a*) 13 East, 323. (*b*) 3 Camp. 441.

which they must otherwise have certainly received, and they would have had a right to resort to the underwriters for a full indemnity. Nor should I have considered it material whether that contract was or was not under seal, or whether it was written or merely verbal. This circumstance only varies the mode of proof, without altering the principle on which the rights of the parties depend. Beyond the one hundred and fifty bags actually on board, the interest of the assured was merely in expectation. For anything that appears, *Don Emanuel Martinus*, the governor, might have refused to send on board another bag, without subjecting himself to an action; and although the storm had never arisen, the ship might have been obliged to return nearly *empty. The loss of freight which the assured now demands, therefore, did not necessarily arise from the event against which the underwriters undertook to indemnify them."

[*163]

Though the commencement of the risk on freight is generally at her port of loading, yet where she is chartered to sail to a certain place to take in a cargo, and is insured "at and from the commencement of her voyage to the end," and is lost on her way out to her port of loading, the policy on the freight nevertheless attaches. Thus in *Thompson* v. *Taylor*, (*a*) on an open policy on freight, at and from *London* and *Teneriffe* to any of the *West India Islands*, (*Jamaica* excepted) the underwriters were held liable to pay the insurance, though the ship sailed from *London* in ballast, and was captured before her arrival at *Teneriffe*, where the cargo was to be put on board. But as the ship was under a charter-party to depart out of the river *Thames*, and proceed to *Teneriffe*, and there to load and receive on board from the freighters five hundred pipes of wine, to be delivered in the *West Indies*, for the freight of which five hundred pipes the freighters covenanted to pay 35*s.* per pipe; the Court held, that the instant the ship departed from the *Thames*, the contract for freight had its inception, and the plaintiff was entitled to recover. At the trial, the plaintiff had obtained a verdict, and the case was afterwards brought before the Court upon a motion to enter a nonsuit. After argument at the Bar,

Lord *Kenyon* said—"When this case came on at *nisi prius*, I thought the plaintiff was not entitled to recover; because I considered it as similar in every respect to that of *Tonge* v. *Watts*, and had it been so, my judgment now would have gone with that case. But this case depends upon its own peculiar circumstances. It is admitted, that if this contract had an inception, that the right to freight then commenced, and the policy attached. Now by the charter-party there was an inception in the contract, by the *departure from the *Thames;* for the covenant in the charter-party was to go from the port of *London*. In the case from *Strange*, the inception of the contract would have been by taking the goods on board, which not being done, the insurance did not attach. In the case of *Montgomery* v. *Eggington*, there was an inception of the contract, and the plaintiff recovered. The case in *Strange* importantly differs from this; but I am now completely satisfied, though the case is new, that the plaintiff ought to recover."

[*164]

Mr. Justice *Grose*.—"In this case the freight begins to run in consequence of the ship's departure from *London;* the plaintiff, therefore, has an interest in the voyage. But in *Tonge* v. *Watts*, the voyage was not begun, nor were the goods on board."

Mr. Justice *Lawrence*.—"I think this plaintiff had an insurable interest: for it seems to me equally as strong an interest as the profits to arise from a cargo of molasses, which have been held to be an insurable interest. (*b*) It is

(*a*) 6 T. R. 478.
(*b*) Grant v. Parkinson, see *ante*, p. 38, 43, 53.

said that the plaintiff had a mere right of action against the freighter; and if he had not provided a cargo, though the plaintiff might recover against the freighter for breach of contract, yet he could not recover against the underwriters. It is true an insurance on freight could not have been recovered, if the ship had proceeded to the *West Indies* without one. But here, by a peril in the policy, the assured is prevented from earning a specific freight; and, therefore, the rule for entering a nonsuit must be discharged." (*b*)

So in *Horncastle* v. *Suart*, (*c*) where a ship was chartered on a voyage from *London* to *Dominica*, and back to *London*, at a certain freight upon the outward cargo, and after delivering her outward cargo at *Dominica*, the charterers were to provide her a full cargo homeward, at the current freight from *Dominica* to *London*, it was held, that an insurance, by the owner of the ship, on the freight at and *from *Dominica* to *London*, attached while the ship lay at *Dominica*, delivering her outward cargo, and before [*165] any part of the homeward cargo was shipped, during which time she was captured by an enemy, the contract of affreightment by the charter-party being entire, and the risk on the policy having commenced, and it being impossible to distinguish this case from that of *Thompson* v. *Taylor* (supra.)

In the Court of Common Pleas, in case of *Cellar* v. *M'Vicar*, (*a*) in an insurance on freight on a voyage at and from *Demerara*, *Berbice*, and the *Windward* and *Leeward Islands* to *London;* the ship being at *Demerara*, an agreement (not in writing) was entered into by the master with a house there for a freight from *Berbice* to *London;* the cargo to be put on board at *Berbice*, and the ship to take a cargo of bricks and planks from *Demerara* to *Berbice*, and deliver them there; while the vessel was proceeding to *Berbice*, with this cargo on board, she met with an accident, and in consequence never earned her freight. This was held not to be a loss within the policy, for the voyage from *Demerara* to *Berbice* had nothing to do with the voyage insured. The voyage insured was from *Demerara* to *London*, or from *Berbice* to *London*, or from any of the Windward or Leeward Islands, according to the place from which the ship might happen to sail on her voyage to *London*. Now, in this case, such voyage never commenced: the case itself excludes any inception of the voyage. The ship took in a cargo for *Berbice*, and then expected to get the cargo she was to carry to *London*.

But subsequently to this, in the same Court, in case of *Atty* v. *Lindo*, (*b*) in a policy on freight on board the ship *Stranger*, "at and from *London* to *Jamaica*, with liberty to touch at *Madeira*, and to discharge and take in goods there:" it appeared in evidence, that the plaintiff, as owner, had agreed with one *De Franca*, by charter-party, that the ship should take in goods at *London*, and proceed to **Madeira*, and there deliver such part of the goods shipped at *London* as the agents of *De Franca* should direct, and [*166] receive on board wine, and proceed to *Jamaica*, and there deliver: and the freighter agreed to pay 135*l.* in full, for freight, during the whole voyage from *London* to *Madeira*, and from thence to *Jamaica;* such freight to be paid in *Madeira*, on delivery of the goods shipped at *London* for that place, by *Madeira* wine at 40*l.* per pipe, to be carried in the said ship free of freight. The ship arrived at *Madeira*, and delivered all her *London* cargo, except thirty-three casks of coal, which the captain kept on board to stiffen his ship. Part of the cargo for *Jamaica* was received on board, but not the wine to be paid for freight, when a gale arose, which obliged the captain to cut his cable and

---

(*b*) See also the case of Mackenzie v. Shedden, 2 Camp. 431.
(*c*) 7 East, 400.
(*a*) 1 N. R. 23.
(*b*) 1 N. R. 236.

run out to sea, where he was captured. The Court unanimously confirmed the verdict of the jury, holding the underwriters liable for a total loss of freight, for the contract of freight was entire, and the charter-party treats the whole as one voyage. The whole freight is to be paid in one gross sum, and that sum is to be paid in *Madeira* wine, valued at a certain sum at *Madeira*. The payment, therefore, is local and indivisable; and on payment of the freight in wine, it is to be carried on in this particular ship to *Jamaica*. Here the accident happened before the condition was performed, on which the freight was payable, namely, the delivery of the goods shipped at *London*.

In short, the great point in all these cases seems to be, whether there is one entire contract for the voyage out and home, and whether the freight is entire: for the Courts seem to have thought that the doctrine laid down in *Thompson* v. *Taylor*, and the other cases of that description, ought not to be extended. But wherever there has been no contract, the rule in the old case of *Tonge* v. *Watts* (*a*) must prevail.

[*167] Thus in an action of *Forbes and another* v. *Cowie*, (*b*) on *an open policy on freight of the ship *Chiswick* at and from any port or ports of *Hayti* (*St. Domingo*) to *Liverpool:* the *Chiswick* sailed from *Liverpool*, and arrived at *Hayti*, with a cargo of plaintiff's, which was to be bartered for other goods to be brought back to *Liverpool* in the ship. Part of the outward cargo was bartered for fifty-five bales of cotton, which were put on board. The remainder of the outward cargo was still on board when the ship was lost by perils of the sea. The remaining part of the outward cargo, though damaged, was saved, and in twelve days after the loss of the ship, was exchanged for other goods the produce of *St. Domingo*, the freight of which would have been of larger value than the sum insured, if the ship had not been lost. The defendant settled for the freight of the fifty-five bales, without prejudice to a further claim for loss of the freight of the homeward cargo. This case on the part of the plaintiff was compared to that of *Horncastle* v. *Suart*, (*c*) and much pressed. But

Lord *Ellenborough* was more disposed to doubt the authority of that case than to extend it. There, however, there was one charter-party for the outward and homeward voyage, and the freight was entire. That is the only ground upon which the decision can be sustained. Here, I can entertain no doubt. The underwriter does not insure that the ship shall have a freight, but only that the owner shall be indemnified for the loss of the freight of goods put on board. What goods were on board when the ship was lost? The outward goods. They were not to be brought home on freight: they were to be bartered at *St. Domingo*. They were the means by which the homeward cargo was to be procured. How then have the plaintiffs been damnified upon the subject-matter of this insurance? By losing the freight of fifty-five bales of cotton, and that they have been already paid by the defendant. The plaintiffs were nonsuited.

[*168] In the ensuing Term, the Court of King's Bench refused a *rule to show cause why this nonsuit should not be set aside. Lord *Ellenborough* on that occasion said, "if there had been a bag of money on board to purchase a cargo when the loss happened, would this have been freighted; and whether it was possible to draw a distinction between goods to be bartered for a cargo and money to pay for one?" The other Judges concurred and expressed an opinion, that the cases upon this subject ought by no means to receive any extension.

(*a*) *Ante*, p. 160. (*b*) 1 Camp. 520.
(*c*) *Ante*, p. 164.

The same case of *Forbes* v. *Aspinall*, (*a*) on a valued policy, came before the Court in Hilary Term, 1811, was fully discussed at the Bar, and the Court, by Lord *Ellenborough*, delivered a very elaborate judgment, conformably to what is said above.

His Lordship says, "To recover in any case upon a policy on freight, it is incumbent on the assured to prove, that unless some of the perils insured against had intervened to prevent it, some freight would have been earned: and where the policy is open, the actual amount of the freight, which would have been so earned, limits the extent of the underwriter's liability. In every action upon such a policy evidence is given, either that the goods were put on board, from the carriage of which freight would result, or that there was some contract under which the shipowner, if the voyage were not stopped by the perils insured against, would have been entitled to demand freight: and in either case, if the policy be open, the sum payable to the shipowner for freight, together with the premiums of insurance and commissions thereon, is the extent to which the underwriters are chargeable. In this case, therefore, as there was no contract under which the shipowner could claim freight, but for the goods actually shipped on the homeward voyage, the assured could have made no claim, had this been an open policy, but to the extent of the actual freight on the fifty-five bales of cotton which were shipped for this country, and of the premiums and commission thereon. The question then is, whether *it makes any essential difference that this is the case of a valued policy? And [*169] we are of opinion, upon full consideration, that it does not. The object of valuation in a policy is to fix, by agreement between the parties, an estimate upon the subject insured, and to supersede the necessity of proving the actual value, by specifying a certain sum as the amount of that value. In fixing that sum, if the assured keep fairly within the principles of insurances, which is merely to obtain an indemnity, he will never go beyond the first cost, in the case of the goods, adding thereto only the premium and commission, and if he think fit, the probable profit; and in the case of freight he will not go beyond the amount of what the ship would earn, with the premiums and commissions thereon. The valuation, however, in the case of goods, looks to all the goods intended to be loaded; and in the case of freight, it looks to freight upon all the goods the ship is intended to carry upon the voyage insured; and if by the perils insured against in a valued policy on goods part only of the goods intended to be covered be lost, the valuation must be opened, and the assured can only recover in respect of that part; and so, if by the perils insured against, the freight of part only of the goods to be carried be lost, the assured can only recover in respect of that loss, according to the proportion which that part bears to the whole sum at which the entire freight was estimated in the valuation."

But where a ship was chartered from *Liverpool* to *Jamaica*, there to take on board a full cargo for *Liverpool*, at the current rate of freight to be paid at one month from the discharge of her cargo at *Liverpool*, and an insurance made on the homeward freight, the ship being lost at *Jamaica* when she had taken in a part of the homeward freight, and the rest ready to be shipped, the Court held this case was governed by *Thompson* v. *Taylor*, and *Horncastle* v. *Suart*, and quite reconcileable with *Forbes* v. *Aspinall*. (*b*)

*In the case of *Williamson* v. *Innes*, (*c*) which was an action [*170] on a policy "on freight" at and from *Algoa Bay* and *Table Bay*, both or either, to *London*: the declaration stated that the ship had arrived, and was in good safety, at *Algoa Bay*, and that a homeward cargo was ready for

(*a*) 13 East, 323.
(*b*) Davidson v. Willasey, 1 M. & S. 313.
(*c*) 1 M. & R. 88; 8 Bing. 8, n.

her under a charter-party, and that before it was put on board she was lost by perils of the sea. Plea, the general issue. At the trial the captain stated that he had arrived with an outward cargo at *Table Bay*, and discharged such part of it as was destined for that place, and had taken up about sixty tons of goods for *Algoa Bay*, where he arrived on the 30th *September*, and came to an anchor: from that time he was engaged till the 8th *October* in discharging his outward cargo when the weather would permit, and that on the evening of the 8th *October*, he gave orders that no more of the outward cargo should be discharged till some of the homeward cargo should be on board, as her load was reduced to seventy tons, which, in his judgment, was requisite for the safety of the ship in the situation in which she was placed: and that he intended to take on board part of the homeward cargo, which was ready for him, the next morning. Before that time however, a storm arose, and the ship was lost: it was contended for the defendant that the vessel was not at the time of the loss in a condition to take in her homeward cargo, and that, therefore, the voyage "at and from *Algoa Bay*" had not commenced. Lord *Lyndhurst*, C. B., told the jury "that the question for them was merely one of fact: that if the ship was in a condition to begin to take in her homeward cargo, the plaintiff was entitled to recover; if not, the verdict ought to be for the defendant." The jury found for the plaintiff.

And the cases or *Truscott* v. *Christie*, (*b*) *Park* v. *Hebson*, (*c*) *Warre* v. *Miller*, (*d*) are authorities to show that in all cases where the freight is lost by a peril insured against, *the assured is entitled to recover, though no goods be actually on board, provided the ship is ready to receive them and the goods are ready to be shipped, or the owner has a contract with any one for their shipment.

[*171]

The principle of law laid down in the foregoing cases was recognized in the two recent decisions of *Flint* v. *Flemyng*, in the Court of King's Bench, Trin. Term, 1830, and *Devaux* v. *l'Anson*, in the Court of Common Pleas, 1839. The first of these, *Flint* v. *Flemyng*, (*a*) was an action on a policy of insurance, dated the 7th *Jan.* 1828, "on freight," on the ship *Hope*, at and from *Madras* to *London*. At the trial, before Lord *Tenterden*, C. J., at the *London* Sittings, after Trinity Term, 1829, it appeared that the ship sailed on her outward voyage on the 5th *August*, 1827, and arrived in *Madras Roads*, on the 30th of *November*, of that year. From that day till the 5th of *December*, the crew were employed in discharging the outward cargo, and on the 6th of that month the ship was lost by the perils of the sea. No part of the homeward cargo was then shipped; but the captain had purchased at *Madras*, by order and on account of the plaintiff, his owner, twenty-five tons of red wood; and a commercial house, then trading under the firm of Binny & Co., had contracted to ship one hundred and twenty-two tons of saltpetre; and Webster, one of the partners of that house, engaged to ship ninety tons of light goods, but as to those goods there was not any contract in writing. It was objected for the defendant, 1st, That the plaintiff could not recover on a policy on freight the loss which he sustained by having been deprived of the opportunity of carrying his own goods in his own ship: 2nd, That there was no contract to ship the light goods, and that, therefore, as to them, the risk had not attached. Lord *Tenterden* was of opinion that though the profit made by a shipowner by carrying his own goods in his own ship was not strictly freight, yet that that word, according to mercantile language, might, in a policy of insurance, *fairly mean that profit which a shipowner expected to make by employing his ship to carry his own goods; and as to the ninety

[*172]

(*b*) 2 B. & B. 320; 5 Moore, 33.
(*c*) Cited in 2 B. & B. 326.
(*d*) 4 B. & C. 538; 7 D. & R. 1.
(*a*) 1 B. & Ad. 45.

tons of light goods, he told the jury that if the captain had a reasonable assurance that they would be shipped, the assured had a right to recover in respect to them the freight which the vessel would have earned if they had been shipped and she had performed the voyage, though there was not any such contract as could be enforced by action. A verdict having been found for the amount of the freight of all the goods, a rule *nisi* was obtained upon both these points.

Lord *Tenterden*.—"If it be a necessary ingredient in the composition of freight that there should be a money payment by one person to another, the benefit accruing to a shipowner from using his own ship to carry his own goods is not freight. But if the term 'freight,' as used in a policy of insurance, import the benefit derived from the employment of the ship, then there has been a loss of freight. It is the same thing to the shipowner whether he receives the benefit of the use of his ship by a money payment from one person who charters the whole ship, or from various persons who put specific quantities of goods on board, or from persons who pay him the value of his own goods at the port of delivery, increased by their carriage in his own ship. The assured may fairly consider that additional value as freight, and so term it in a policy. Then, as to the other point, to recover on a policy on freight, the assured must prove that but for the intervention of some of the perils insured against, some freight would have been earned, either by showing that some goods had been put on board, or that there was some contract for doing so. The question was not submitted to the jury whether there was any contract between Webster (acting on behalf of Binny & Co.) and the captain for the shipment of the light goods. The defendant, therefore, is entitled to a new trial upon that ground; but he must, at all events, have a verdict against him for the amount of the freight on the red wood and saltpetre. It would, therefore, be advisable for the defendant to pay to the plaintiff the costs of this action and *the freight of the red wood and saltpetre, and that he should undertake to pay the freight of the light goods, if, on reference to an arbitrator, it shall be found that there was a contract to ship these goods." [*173]

Which suggestion was adopted.

In the next case of *Devaux* v. *l'Anson*, (*a*) the owner of a vessel effected a policy of insurance on freight "at and from *Calcutta*, or any port or place on the *Coromandel Coast*, to any port or place at *Bourbon*." The vessel put in at *Coringa*, a port on the *Coromandel Coast*, for the purpose of repair. The repairs were completed, and a full cargo purchased for the owner, and deposited in warehouses at a place about seven miles from *Coringa*, ready to be put on board. Whilst in the act of being got out of the dock in which the repairs were done, the vessel received such injury as to make her a perfect wreck, and render abandonment necessary. A verdict was taken for the plaintiff, subject to the opinion of the Court upon a special case, to which we must refer the reader, it being too long for insertion. Lord C. J. *Tindal* now delivered the judgment of the Court. His Lordship, after stating the facts of the case, said,—"The first objection involves two distinct and separate heads of consideration. First, whether the interest of the assured in the subject-matter of insurance is properly described in the policy as freight. Secondly, if such description is sufficient in the policy, then, whether the interest of the assured had commenced before the loss happened.

"1. We consider the first question to be set at rest by the decision of the Court of King's Bench in the case of *Flint* v. *Flemyng*, (*b*) and hold it now to be established law that the assured, under an insurance upon freight, may

(*a*) 7 Scott, 507; 5 B. N. C. 519. (*b*) 1 B. & Ad. 45.

recover the profits expected to be made by carrying their own goods in their own ship upon the voyage insured.

"2. The second head of inquiry may be subject to some degree of doubt and difficulty; but, upon the whole, we *concur in opinion that, [*174] under the circumstances stated in the case, the interest of the assured had commenced, and the policy had attached at the time the loss took place.

The argument which has been mainly relied upon on the part of the underwriters is this, that, in order to enable the assured to recover a loss upon a policy on freight, there must be a cargo either actually put on board, or ready to be put on board, under a contract for that purpose; and in the latter case the ship must also be ready to receive the cargo; and, in this case, it is contended by the underwriter that by reason of the loss of the ship before she was out of dock and actually afloat, she was never in a condition or ready to receive the goods on board: the defendant relying on the expression used by Lord *Ellenborough*, in giving the judgment of the Court of King's Bench, in *Forbes* v. *Aspinall*, (*a*) that, in order to recover on a policy on freight, a full cargo must be ready to be shipped, and the ship must be in a condition to receive the cargo. The proposition that the ship must be ready to receive her cargo, had, in that case, an immediate bearing and application to the facts then before the Court; for the policy was on freight upon the homeward voyage, and the homeward cargo was to be made by barter of the outward cargo, and the whole of the outward cargo had not been bartered at the time of the loss, part of it being still on board, so that it was impossible, under those circumstances, that the homeward cargo could be received on board the ship at the time of her loss. In that case, therefore, the loading of the homeward cargo on board, upon which depended the attaching of the policy, and the commencement of the right of the assured to the freight, was not prevented by any of the perils insured against by the policy as the proximate and immediate cause of such prevention, but by a cause altogether without the risks included in the policy, namely, by the inability of the ship to receive the cargo on board, by reason of her being then partly loaded with the outward cargo; whereas, in the *case now before us, it appears that the ship was on the 14th [*175] *August* quite ready to go to sea, and to receive the cargo on board, that nothing remained to prevent her sailing but the getting her out of dock, and that the loss of the ship, and consequent inability to receive the cargo, was occasioned solely by the endeavour to get her out of the dock and afloat in the river. If, therefore, the loss of the ship in this case was occasioned by any of the perils within the meaning of the policy, the case is distinguishable from that of *Forbes* v. *Aspinall* in this, that the immediate cause of prevention of taking the goods on board was not occasioned by the inability of the ship to receive the cargo, but by the ship being disabled to receive the cargo by one of the perils insured against. For, so far as relates to the cargo, we think it must be considered as in a sufficient state of readiness to be put on board. It was purchased by the assured for the express purpose of the adventure mentioned in the policy: it was comparatively useless for any other purpose; and the whole of the purchase was completed before the repairs were finished; and although it had been deposited in warehouses at seven miles distance, yet it was deposited there for the purpose of being put on board; and it is impracticable, as it appears to us, to lay down any precise rule as to the distance within which the cargo must be from the ship at the time of the loss, whether close to it upon the quay, as in *Flint* v. *Flemyng*, (*b*) or at a more

(*a*) 13 East, 331. (*b*) 1 B. & Ad. 45.

considerable distance, as in the present case. All that it seems necessary to determine with respect to the cargo being, that it must have become the property of the parties insured by a contract made with a view to its being sent on board, and actually in a state of readiness, reference being had to the nature and description of the voyage insured, to be put on board when the ship arrives at the place of deposit."

When the words "at and from" a given place are used in a policy of insurance, the risk is always understood to commence upon the ship's first arrival at that place.

*And it has also been held in the case of *Chitty* v. *Selwyn*, (*a*) that when the ship is insured "at and from" a given place, and [*176] it arrives at that place, as long as the ship is preparing for the voyage upon which it is insured, the underwriters are liable; but if all thoughts of the voyage be laid aside, and the ship lie there five, six, or seven years with the owner's privity, it shall not be said the underwriter is liable, for it would be to subject him to the whim and caprice of the owner who chooses to let his ship lie and rot there. And, therefore, in the case of *Palmer* v. *Marshall*, (*b*) which was on a policy of insurance on the yacht *Ruby*, "at and from *Bristol* to *London*," the policy bearing date 28th *January*, 1831, and it appeared at the trial, that the *Ruby*, at the date of the policy, was lying in the float at *Bristol*, where she continued till 17th *May*, and then commenced her voyage round the *Land's End*, and was run down on the 21st *May*; and that as the vessel was lying in port complete and ready for sea for three months after the execution of the policy before she sailed, it was a material variation of risk.

And in the case of *Smith* v. *Surridge*, (*c*) where a ship, the *Resolution*, was insured "at and from *Pellew* to *London*," it was proved that she remained a considerable time at *Pellew* to complete her repairs before she commenced her voyage; an objection was made that the delay avoided the policy. Lord *Kenyon* said, "that if there was any unreasonable delay on the part of the assured, there was no doubt it would avoid the policy," though he afterwards observed, that "the delay was not a voluntary delay, nor such as amounted to the discharge of the policy."

But it is not necessary, in making an insurance "at and from" a given place, that the ship should be there at the time: all that is requisite is, that there should not be a delay elapse between executing the policy and her arrival at the place, as to constitute a material variation of risk. In *Hull* v. *Cooper*, (*d*) *Lord *Ellenborough* says, "When a broker proposes a policy to [*177] an underwriter on a ship 'at and from' a certain place, it imports either that the ship is there at the time, or shortly will be there; but it never was understood that the terms of such a policy imported that the ship was there at the very time, so as to make the assured guilty of deception if she was not. It was a question for the jury whether the delay materially varied the risk in this instance." And in another case of *Mount* v. *Larkins*, (*a*) Lord C. J. *Tindal* says, "What is the difference with respect to the alteration of the voyage, whether this unreasonable and unjustifiable delay takes place in the course of the ship's voyage to *Singapore*, or after the ship is at *Singapore?* The underwriter has as much right to calculate on the outward voyage in which the ship is engaged being performed in a reasonable time, and without any delay, in order that the risk may attach, as he has, that the voyage insured

(*a*) 2 Atk. 359.
(*b*) 8 Bing. 79.
(*c*) 4 Esp. 25.
(*d*) 14 East. 479.
(*a*) 8 Bing. 122.

shall be commenced within a reasonable time after the risk has attached." There has been a very recent case in the Court of Common Pleas on this subject, and in which reference was made to the above case of *Mount* v. *Larkins*. This was the case of *Phillipps* v. *Irving*. (*b*) The action was on a policy of assurance on the ship *Broxbourneburg*, "at and from *London* to *Bombay*, and thence to *China* and back to the *United Kingdom*, with liberty to touch, stay, and trade at all ports and places on this side, at, or beyond the *Cape of Good Hope*. The question was, whether the ship had stayed an unreasonable time at *Bombay*. *Tindal*, C. J., "It may be collected from numerous cases, that delay before or after the commencement of the voyage insured, is not equivalent to a deviation unless it be unreasonable."

When the policy is "at and from an island or district comprehending several ports," a policy on the homeward voyage protects the sailing from one port to another in the same island or district, but the outward voyage ceases after she [*178] has *been moored at the first port. Thus in the case of *Camden* v. *Cowley*, (*a*) which was an action on a policy of insurance on a ship "at and from *Jamaica* to *London*." The ship had also been insured "from *London* to *Jamaica*" generally, and was lost in coasting the island, after having touched for some days at one port there, but before she had delivered all her outward-bound cargo at the other ports in the island. This was an action on the homeward policy; and in order to shew at what time the homeward-bound risk commenced, it was necessary to shew at what time the outward-bound risk determined; and the jury, which was special, after an examination of merchants as to the custom, by their verdict decided that the outward risk ended when the ship had moored in any port of the island, and did not continue till she came to the last port of delivery. In Trin. Term following, a motion was made for a new trial, but it was refused, because it was thoroughly tried, and no new light could be thrown upon it, although Lord *Mansfield* said the inclination of his opinion at the trial was the contrary way. Mr. J. *Wilmot* thought that the jury had put the right construction upon the policy.

In a similar case of *Barras* v. *London Assurance Company*, (*b*) Lord *Mansfield* laid down the same doctrine to the jury, viz: that the outward risk upon "the ship" ended twenty-four hours after its arrival in the first port of the island to which it was destined: but that the outward policy on goods continued till they were landed. The law laid down in the last decisions was confirmed in a subsequent case, of *Leigh* v. *Mather*. (*c*) It was an action on a policy of insurance on "the ship *Palliser*," and on goods on board thereof on a voyage at and from *Georgia* to *Jamaica*." The ship arrived in *Montego Bay*, and moored at anchor, and there also the agent of the plaintiff sold and [*179] delivered the greatest part of the cargo to Messrs. Adams and Hatton, *merchants there. The captain entered into a charter-party with Adams and Hatton, to proceed from thence to *St. Anne's*, and there to take in a cargo for *London*. After unloading the greatest part of the cargo at *Montego Bay*, and remaining there a month, it was verbally agreed that the remainder of the cargo (which was lumber) should be carried as ballast to *St. Anne's*—and accordingly the vessel, after taking in some fustic, proceeded toward *St. Anne's*, but was wrecked, and never arrived there. For the plain-

(*b*) 8 Scott, N. R. 3. This case is more fully mentioned in sec. vii. under the clause giving liberty to touch, stay, &c. *post*.

(*a*) 1 W. Black, 417.

(*b*) Sit. after Hil. 1782, at Guild. Park Ins. 74.

(*c*) Sit. at Guild. after Mich T. 1795. Park Ins. 74.

tiff it was urged, that in such an insurance the ship might go from port to port; and that at all events the goods were protected by the policy, till they were all discharged and safely landed. Lord *Kenyon* was clearly of opinion, and was confirmed in that opinion by a special jury, to whom his lordship particularly referred on this occasion, that the risk on the ship ceased after she had been moored at anchor twenty-four hours in the first port of the island, for the purpose of unloading; and the facts disclosed in this case having manifested that *Montego Bay* was also the original destination of the cargo, and that its not being wholly delivered there was only prevented by a new agreement, the loss of the goods cannot be recovered under this policy of insurance. A ship insured to *Jamaica* generally, cannot be permitted to go round the whole island, from port to port, for the purpose of unloading her cargo, especially where, as in this case, the owner of the ship and goods is the same person. The plaintiff was nonsuited.

In the case of *Cruickshank* v. *Janson* (*a*) it was held, that under a policy "at and from" an island, a ship is protected in going from port to port in the island. So, in a case of *Warre* v. *Miller*, (*b*) which was an action on a policy of "insurance on freight, from *Grenada* to *London*," it was proved that there was *one* custom-house only for the whole island of *Grenada;* that the vessel arrived in safety in *Grenada*, and discharged a part of her cargo at *three* different bays, and *she was proceeding to a *fourth*, to discharge the residue of her outward cargo (the captain having previously made [*180] engagements with several persons for the homeward cargo, amounting very nearly to a full cargo,) when she was lost by perils of the sea. It was held that the vessel, at the time of the loss, was proceeding to the fourth bay, for a purpose connected with the voyage insured, and that the underwriter was liable.

It may here be observed, that, although in the previous cases of *Forbes* v. *Cowie*, (*a*) and *Forbes* v. *Aspinall*, (*b*) it was decided by Lord *Ellenborough*, that a ship could not be said to be ready to take in her homeward cargo, whilst she had her outward cargo on board, so as to make the policy on the freight of the homeward cargo attach, in those cases the outward cargo had to be bartered for the homeward as it was landed, whereas in the present case the captain had entered into contracts for the homeward goods before starting for the fourth bay, and his sailing round the island was in the course of his preparing to take them in.

As the attaching of the risk frequently depends upon a ship's arriving at or sailing from a particular port, it is material to consider what it is that properly constitutes a port, in construction of law.

In the case of *Constable* v. *Noble* (*c*) it was held that a policy "at and from" a place, for instance, from *Lyme* to *London*, which not only designates a town but a port also, comprehending a large district of coast: so that *Bridport*, which is eight miles nearer *London* than the town of *Lyme*, does not protect a cargo laden any where within the limits of the port, such as *Bridport*, but must be taken to refer to the town itself.

Mansfield, C. J. says:—"If the plaintiff in this case could have proved an usage for ships to load at *Bridport*, upon a policy 'at and from *Lyme*,' it might have assisted him, but no such usage was proved here."

*In the case of *The Sea Insurance Company of Scotland* v. *Gavin*, (*a*) where a brigantine was insured "to *Barcelona*, and [*181] from thence to other ports in *Spain*, to a port in *Great Britain*," and she put

---

(*a*) 2 Taunt. 301.
(*b*) 4 B. & C. 538.
(*a*) *Ante*, p. 166.
(*b*) *Ante*, pp. 161, 168, 174.
(*c*) 2 Taunt. 403; and see Payne v. Hutchinson, 2 Taunt. 405, n.
(*a*) 4 Bligh, N. S. 578. 2 Dow. & Clark, 125, S. C.

into a place, situate in the recess of a bay, having a custom-house and port-captain, and having also warehouses and a jetty, with accommodation for small vessels only, there being, however, convenient anchorage for large ones in the roadstead; and the ship, having been lost in the roadstead, this was held to be a port within the meaning of the policy.

And in the important and recent case of *Brown and others* v. *Tayleur*, (*b*) in which the meaning, in construction of law, of the term "port," was fully discussed by the Court of King's Bench. It was an action on a policy of insurance on a "ship, at and from her port of lading in *North America* to *Liverpool.*" On the trial, before Lord *Denman*, C. J., at the sittings in *London*, after Trin. Term, 1834, it appeared that the ship was launched at *Cocagne*, in the province of *New Brunswick*, at the end of *June*, 1828; that a few days after she was afloat she began to take in her cargo of timber at *Cocagne*, and continued to do so for three weeks. During this time the vessel was described as lying "in the stream, inside of *Cocagne* bar." On the 1st *August* she sailed from thence for *Buktouche*, situate five or seven miles distant, to complete her loading. She arrived there in a few hours. *Cocagne* and *Buktouche* are situate in different creeks of the same bay. *Buktouche* is not in the line of voyage from *Cocagne* to *Liverpool.* The vessel lay off *Buktouche* three weeks, to take in the remainder of her cargo; and returned to *Cocagne* on the 22nd *August*, to receive provisions, and get ready for sea. She sailed on the 31st *August*, and was lost on the voyage. *Cocagne* was described by the witnesses as a "harbour" and "a port," and *Buktouche* as a "port;" but neither [*182] had a custom-house, though there were officers *of the customs at both places; and it appeared that they were both within the jurisdiction of the custom-house of *St. John's*, *New Brunswick.* It was contended for the defendant that there had been a deviation; and the Lord Chief Justice gave the defendant leave to move to enter a nonsuit on this objection. After argument at the Bar, Lord *Denman*, C. J., said,—"I think the rule for a nonsuit must be made absolute. It was clear, on the close of the evidence for the plaintiffs, that *Cocagne* and *Buktouche* were two distinct places, and two places at each of which there might be a loading."

Patteson, J.—"I am of the same opinion. We cannot construe the words 'at and from her port of lading,' as if they were 'at and from her ports:' the expression used points out one single place. Nor can we adopt the technical meaning to be ascribed to 'port,' as signifying all that is subject to one custom-house or one port jurisdiction; the result of which would be, that a ship, under such a policy as this, might sail to every port of a district so situated. The cases which explain the meaning of the word 'port' are many. (*a*) Here I think that 'port' means the same as place, and that the vessel's place of lading must be one place. When she once began to take in her cargo at *Cocagne*, that was her place of lading, and her removal afterwards was a deviation. The cases of insurances 'at and from *Jamaica*' (referred to in the argument) do not apply. If the policy in those cases had said, 'at and from her port of lading in *Jamaica* or *Grenada*,' the commencement of the voyage would have been restricted. In construing the word 'port' as the place of lading, I do not mean to say that, if a ship were at a particular quay on a river, as at *Liverpool*, and merely moved a mile or two off to another quay, that would be a deviation, because the vessel would then be all the time in one port or place; but it is a deviation if she removes to a different town, a different place of habitation, and a point which might itself be her place of lading."

(*b*) 9 A. & E. 241.

(*a*) His Lordship referred to the case of the Sea Insurance Company of Scotland v. Gavin, *ante*, p. 181.

*Mr. J. *Williams* and Mr. J. *Coleridge*, concurred, and the rule for the nonsuit was made absolute. [*183]

In policies, the words usually employed to express the commencement and end of the risk are these:—"Beginning the adventure upon the said goods and merchandises, from the loading thereof on board the said ship, and so shall continue and endure until the said ship, with the said goods, be arrived at , (her port of delivery) and until the same shall be discharged and safely landed." But this clause is frequently varied by the agreement of the parties; and sometimes the risk on the goods is made to commence from the loading thereon at a given place, in which the policy will attach only upon such goods as are there put on board, and not on goods shipped elsewhere, though they are the very goods meant to be insured, and were on board at the place specified by the policy.

This was fully settled in the case of *Robertson* v. *French*, (*a*) in which Lord Chief Justice *Ellenborough* delivered an elaborate judgment, and very fully considered the rules which are to govern the construction of policies of insurance, and the effect of the written words upon the usual printed form of this species of contract.

This was an action on a policy of insurance, (*b*) effected by the plaintiffs as agents, "lost or lost not, at and from *all, any, or every port and place where and whatsoever on the coast of Brazil, and after the 17th day of September*, to the *Cape of Good Hope*, upon any kind of goods and merchandises, and also upon the body, &c., of the ship *Chesterfield*, &c.; beginning the adventure upon the said goods and merchandises from the loading thereof aboard the said ship, *at all, any, or every port and place where and whatsoever on the coast of Brazil, and from the 17th day of September*, 1800, *and* upon the said ship, &c., *in the same manner;* and so shall continue and endure during her abode there upon the said ship, &c., and further until the said ship, &c., and goods, *&c., shall be arrived at *Simon's Bay* or *Table Bay*, [*184] *both or either, with liberty to call at St. Helena, or elsewhere,* upon the said ship, &c., and upon the goods, &c., until the same be there discharged, &c. And it shall be lawful for the said ship, &c., in this voyage to proceed and sail to and touch and stay at any ports or places whatsoever, *particularly backwards and forwards, and to and from those under the Portuguese Government, or any port, place, island, or elsewhere on the coast of South America, without being deemed any deviation, and* without prejudice to this insurance. The said ship, &c., goods, &c., valued at 15,680*l.*, *being upon goods, ship, and freight, separately valued as under. And in case of capture, detention, or seizure, by any power whatever, to pay a total loss upon receiving documents of her being carried into port, and without inquiry into the regularity or irregularity of her proceedings; and with liberty to sell, barter, exchange, load or unload the interest, in part or whole, at the island of St. Catharine, or elsewhere, where, and whatsoever.* Touching the adventures and perils, &c. [This part of the policy was in the common form.] At the rate of *four guineas per cent., to return three pounds and ten shillings should the ship have arrived, or this risk otherwise have ceased, on or before the 17th of September.* In witness, &c." At the bottom of the policy, the goods were valued at 13,316*l.*; ship at 1,550*l.*; and freight at 814*l.* The plaintiffs declared as agents of Robertson and Walker, upon a loss by the arrest and restraint of the king's ships. And at the trial before Lord *Ellenborough*, C. J., at the Sittings after Hilary Term, at *Guildhall*, it was

(*a*) 4 East, 130.

(*b*) The words in italics were written, the rest of the policy set out was in the usual printed form.

admitted that the goods were of the value insured, and had been put on board the ship *Chesterfield* at the *Cape of Good Hope*. Much of the evidence turned upon the question, whether the object of the voyage were to trade with the *Spanish* settlements in *South America; Spain* being then at war with this country? or, whether it were only in contravention of the trading laws of *Portugal?* But nothing turned upon that point in the case as presented for the consideration of this Court.

[*185] *It is sufficient to state, that after the cargo had been taken in at the *Cape of Good Hope*, the ship went from thence, on the 7th of *February*, 1800, to *Benguela*, on the coast of *Africa*, and afterwards to *St. Catharine's*, on the coast of *Brazil*, on the 30th of *May;* then to *Rio Janeiro* on the 27th of *July:* staid there upwards of two months, and remained on the coast till the latter end of *November*, when, on suspicion of illicit trading with the *Spanish* enemy, she was taken possession of by some of his Majesty's ships of war, and carried again to the *Cape*, with the original cargo on board, where she was libelled by the captors in the *Vice Admiralty Court* there, on which the assured abandoned to the underwriters; and the ship, after being liberated by the sentence of the Court, was sold there, and has since arrived in *England*, about *October*, 1802.

Lord *Ellenborough*, C. J., now delivered the judgment of the Court. "This rule was moved for, secondly, That the policy on this ship and cargo never attached; the adventure on the cargo being by the terms of the policy made to commence from the loading the goods aboard the ship on the coast of *Brazil;* an event which, as it was contended by the defendant, never happened, inasmuch as the goods were not loaded there, but at the *Cape of Good Hope*. And it was also contended on the part of the defendant, that the adventure on the ship, being by the terms of the policy made to begin in the same manner with that on the goods, could of course have no commencement, if that on the goods never attached. [After stating the policy as before mentioned, his Lordship proceeded.]

"In the course of the argument it seems to have been assumed that some peculiar rules of construction apply to the terms of a policy of assurance which are not equally applicable to the terms of other instruments and in all other cases: it is therefore proper to state upon this head, that the same rule of construction which applies to all other instruments, applies equally to this instrument of a policy of insurance, viz: that it is to be construed according to its

[*186] sense and *meaning, as collected in the first place from the terms used in it, which terms are themselves to be understood in their plain, ordinary, and popular sense, unless they have generally in respect to the subject-matter, as by the known usage of trade, or the like, acquired a peculiar sense distinct from the popular sense of the same words; or unless the context evidently points out that they must in the particular instance, and in order to effectuate the immediate intention of the parties to that contract, be understood in some other special and peculiar sense. The only difference between policies of assurance, and other instruments in this respect is, that the greater part of the printed language of them, being invariable and uniform, has acquired from use and practice a known and definite meaning, and that the words superadded in writing (subject indeed always to be governed in point of construction by the language and terms with which they are accompanied) are entitled nevertheless, if there should be any reasonable doubt upon the sense and meaning of the whole, to have a greater effect attributed to them than to the printed words, inasmuch as the written words are the immediate language and terms selected by the parties themselves for the expression of their meaning, and the printed words are a general formula adapted equally to their case and that of all other contracting parties upon similar occasions and subjects.

"As to the second point made in this case, viz: that the policy on the ship and goods never attached: it is asserted on the part of the defendant, that the adventure in question as to its commencement, according to the natural and obvious meaning of the language and terms of the policy, depends upon and is limited by the co-existence and concurrence of three several circumstances, viz: one of *place*, one of *time*, and one of *event or fact*. And first of place, that it is to attach on the coast of *Brazil:* secondly, of time, that it should attach there after the 17th of *September:* and thirdly, of event, that the goods should have been then loaden at some port or place on the coast of *Brazil*. The adventure upon the ship is in terms declared to begin "in the same [*187] *manner," *i. e.*, at the time, and place, and after the happening of the events before described and specified in respect to the cargo. But it is argued on the part of the plaintiffs, that the latter circumstance of event or fact, as I have termed it, does not affect the commencement of this adventure: and that the words 'from the loading thereof aboard the said ship,' are either to be rejected wholly; in which case the policy will stand thus, 'beginning the adventure upon the said goods and merchandises at all, any, or every port and place where and whatsoever on the coast of *Brazil*,' without regard to the place at which such goods may have been in fact antecedently laden; or that the words 'from the loading thereof aboard the said ship 'at,'' are to be understood from the time of the ship's being with the goods laden on board her, or having such her cargo on board her, at the place mentioned in the policy, *i. e.*, in this case, at the coast of *Brazil*. The objection to the first of these constructions (besides the difficulty of wholly rejecting words having an apparently significant meaning, and referring distinctly to an act to be done at a given place) is stated to be this, that if the cargo insured be understood to be generally a cargo at, or a cargo on board on the coast, and not one actually and originally taken in upon the coast, the policy would in that case cover the risk on two successive cargoes, *i. e.*, on the outward cargo with which the ship should be in a loaded state on the coast after the 17th of *September*, and the homeward, or that which it should take in there; and that it would not be just towards the underwriter so to construe the words, as to cover thereby in his risk two successive cargoes, when one original cargo only, according to all the ordinary usages of trade and practice of insurance as applied to such form of words must be understood to be meant, in addition to the liberty of sale, barter, and exchange, given by a subsequent part of the policy: and further to reject emphatical words, in order to accomplish a construction so much to the apparent disadvantage of the underwriter. And indeed if only one original cargo were meant to be covered, a *Brazil* cargo appears to have the best [*188] *claim to be considered as that one. For it would be preposterous to consider the policy as meant, in preference to any other one cargo, to cover a cargo taken in at the *Cape of Good Hope*, and which should remain unprotected as far as this policy is concerned, wherever it should be, till the 17th of *September*, and from that day, if it were then on the coast of *Brazil*, should be protected there, and during the course of barter, sale, and exchange at the island of *St. Catharine* and elsewhere, and during its reconveyance afterwards back to the *Cape* from which it had originally proceeded. The same objection in a great measure applies to the second construction, which without wholly rejecting the words 'from the loading thereof aboard the said ship,' considers the goods as the subject of insurance when, after the 17th of September, they should be in a loaded state at the coast of Brazil: for this construction would equally exclude the possibility of covering by this policy an homeward cargo taken in at the coast of *Brazil* to be carried to the *Cape*, provided the ship should have arrived on the coast of *Brazil* with an original cargo on board; unless indeed two successive cargoes could be covered by a policy conceived in

these terms. But the most natural construction of the words, if the immediate letter of them were less directly applicable to a cargo taken in on the coast, seems to be to make them apply to a cargo to be carried to the terminus *ad quem*, upon and within the immediate limits of the voyage described in the policy, rather than to a cargo conveyed, as it should seem, in the course of useless circuity from the place from which the ship originally proceeded before the voyage in question had commenced; continuing, except inasmuch as it might be altered by barter, sale, and exchange, on board during the voyage, and to be delivered at the place at which the voyage is at last appointed to terminate. But the question naturally occurs, is there any thing to be found in the policy which assigns to these words a sense, thus apparently different from the ordinary grammatical sense of them? And looking, as we are obliged to do, to the policy, and to the policy alone, in order to collect the [*189] *intention of the parties as to the commencement and duration of the adventure thereby protected, we cannot feel ourselves at liberty to disjoin in point of effect and construction the words, 'at all or any port or place on the coast of *Brazil*,' from the words, 'from the loading thereof aboard the said ship,' by which they are immediately preceded, and with which by immediate context they appear to us to be necessarily united. If the same words had not been thus incorporated with the body of the text of the printed words, and made to form therewith one entire and continued chain of words, and one unbroken sentence of intelligible expressions all applicable to the same subject-matter, it might perhaps have been open to us to have given them a different meaning, and to have considered them as words written in the margin of the policy, (and applying, therefore, indefinitely to the whole of the policy, and not to any particular part of it) are usually considered; that is, as controlling the sense of such parts of the printed policy to which, in sound construction, and by reasonable reference, they may appear to apply. As, for instance, where the word *ship* is written in the margin of the policy, or *freight*, or *goods:* in such case the general term of the policy, applicable to other subjects besides the particular one mentioned in the margin, are thereby considered as narrowed in point of construction to that one. And this is done in cases where the subject meant to be insured is still more remote from 'ship and goods,' the only subjects of insurance in the printed policy, viz: where the object of the insurance, as declared by the marginal memorandum, is, money lent on *bottomry* or *respondentia*, or the like: the meaning of which marginal memorandum may be translated thus:—We mean to insure the subject so named, '*freight*' for instance, arising and accruing during the limits of the voyage within described, from the carriage of goods on board the ship within mentioned, against the perils within enumerated, and upon the premium herein specified. In other words, we adopt the general language of the policy, as far as *it may serve to effectuate this object, and no further. Had, [*190] indeed, the subject-matter of the insurance itself, or the character, situation, and description of the persons making it, or any other circumstance attending the insurance pointed out and required a narrow rule of construction, the ordinary effect of these words might perhaps have been in such case controlled: but can any such restrictive rule of construction be applied to the words 'at all, &c., ports and places on the coast of *Brazil*,' as they occur here, without shaking the fundamental rules of construction as applicable to all deeds and instruments whatsoever? Feeling, therefore, the impossibility of assigning to these words any other place in or with reference to this contract than what the parties themselves have done, and feeling the impossibility of assigning to them in that place, and with the context which attends them, any other meaning than what they obviously and in their plain grammatical sense import, we are obliged to say that the adventure could only attach on goods and ship after a loading of

goods had taken place on the coast of *Brazil:* and as that circumstance or event never took place in the present instance, that the policy of course never attached at all. It certainly was in the contemplation of the parties that the risk meant to be insured might have ceased before the 17th of *September*, 1800, and a return of premium is provided in that event: but I do not think that the construction of the rest of the policy is so materially affected by this stipulation as to require any particular observations upon it. Upon the whole, we are of opinion that this rule, which calls on the plaintiff to shew cause why the verdict should not be set aside, and a nonsuit entered, must be made absolute."—Rule absolute.

The subject treated of in the preceding case, namely, whether a policy from A. to B., beginning the adventure upon the said goods, from the loading thereof aboard the said ship shall cover a policy for goods loaded antecedently to the vessel being at A., has been the subject of much discussion from the time of Lord *Mansfield* to the present.

*In *Hodgson* v. *Richardson*, (*a*) the case was, that the ship was insured at and from *Genoa*, (the adventure to begin from the loading to equip for this voyage) liable to average: her loading consisting of potash, verdigris, and cotton, and other perishable commodities. This loading was put on board at *Leghorn*, the 10th *August*, and the vessel had lain at *Genoa* about five months, being originally bound for *Dublin;* but losing her convoy, she put into *Genoa* the 13th *August*, and lay there till the 5th of *January*, when she sailed. The insurance was made on the 20th *January*, at which time the facts were known to the assured, but not communicated to the underwriter. A few days after she put to sea she was shattered by a storm, and the cargo considerably damaged. The assured brought his action on the policy; and the jury found a verdict for the plaintiff. And now *Morton* and *Dunning* moved (Eas. Term, 4 Geo. 3, K. B.) for a new trial, contending that the policy was bad "*ab initio*" for want of a due disclosure of the circumstances; as *Genoa*, from the wording of the policy, imported to be the port of loading: and the goods were liable to have taken damage by having lain so long aboard: and therefore, although the present loss actually happened by a storm, still the policy being originally bad, the assured cannot recover. Lord *Mansfield*, C. J.: "In this case the verdict ought not to stand. The question is, whether there was a sufficient disclosure, *i. e.*, whether the fact concealed was material to the risk run. This is a matter of fact, and, if material, the consequence is matter of law that the policy is bad. Now who can say, that no risk was run during the five months' stay at *Genoa*, or no damage happened in that period? The policy is founded upon a misrepresentation; the ship is insured at and from *Genoa* to *Dublin*, the adventure to begin from the loading to equip for this voyage. This plainly implies that *Genoa* was the port of loading. And at the trial all the witnesses said, that it was material to acquaint the underwriter whether *the insurance was to be at the commencement or the middle of the voyage." *Wilmot*, J.—"The fact disclosed by this policy is not true, viz: that *Genoa* is the loading port, for so it must be understood. And in such cases I will not speculate on the materiality or immateriality of the fact. Not but I think the length of the stay at *Genoa* is very material in the case of such perishable commodities." Rule for a new trial, absolute.

[*191]

[*192]

In the case of *Robertson* v. *French*, it may be remembered that the loading was confined to a particular place, beginning the adventure upon the said goods from the loading thereof aboard the said ship at all, any, or every port or place

(*a*) 1 W. Black. 463.

where or whatsoever, on the "coast of *Brazil*;" whereas the goods were not loaded there, but at the *Cape of Good Hope*. In the case of *Hornyer* v. *Lushington*, (*b*) the action was on a policy of insurance at and from *Gottenburg* to *Riga*, or any ports in the *Baltic*, upon "goods and ship *Amelia*," beginning the adventure upon the goods from the loading thereof aboard the said ship at *Gottenburg*. The declaration averred that on the 13th *September*, 1809, the ship was in good safety at *Gottenburg*, and that the cargo in the policy and memorandum mentioned was of great value: and that afterwards the ship, with the cargo, set sail from *Gottenburg*, and arrived at *Riga*, where with the cargo she was taken, arrested, and detained by the emperor of *Russia*, and wholly lost. At the trial, before Lord *Ellenborough*, C. J., at the *London* sittings after Trin. Term, 1811, it appeared that the goods insured were laden on board the ship in the port of *London*. Lord *Ellenborough* directed the jury to find a verdict for the defendant, reserving leave to enter the verdict for the plaintiff. After the argument upon the point in the case, on the subject of our present inquiry, Lord *Ellenborough*, C. J., said: "When this question was first agitated, I had a difficulty in putting the construction which is [*193] now contended for upon words I really believe bore a different *construction in the commercial understanding of those who used them. However, the Court came to a decision on the point in the case of *Robertson* v. *French:* and this question now comes before us after the case of *Spitta* v. *Woodman*. (*a*) It is therefore no longer doubtful what construction is to be put upon these words. It is to be considered also in aid of such construction, that the goods may have been damaged in their transit from *London* to *Gottenburg*, which might cast upon the underwriter a damage occurring anterior to the commencement of the risk. It seems to me, therefore, that under the terms of this policy, the risk upon these goods never attached, and there must be a proportional return of premium." *Grose*, J. concurred. *Bayley*, J.: "In *De' Symonds* v. *Shedden*, (*b*) the Court of Common Pleas seems to have entertained the same opinion." And, at length, both in the Court of King's Bench, and in the Common Pleas, it was decided, that where the words of the policy were general "at and from a place," and the adventure on the goods to begin from the loading thereof on board the ship, (without saying where) as in *Spitta* v. *Woodman*, (*c*) and *Langhorn* v. *Hardy*, (*d*) and *Mellish* v. *Allnutt*, (*e*) goods loaded on board before the arrival at the place named as that from which the risk is to commence, will not be protected.

But wherever the Court can collect from the circumstances of the case, or from the words used, that it was the intention of the parties to cover such antecedent loading, they will give the policy that construction. Thus in the case of *Nonnen* v. *Kettlewell*, (*f*) which was an insurance on sugar free of particular average, at and from *Landscrona* to *Wolgast*, the underwriters had been informed that part of the goods had been shipped on board the same vessel some months before, at *Gottenburg*. Part of the cargo was taken out of the ship's hold, and landed on the quay, and replaced in the ship. A sufficient quantity [*194] was taken out to enable *the Custom-house officers at *Landscrona* to examine the whole cargo on board, the duties on which were paid. The Court held this to be an actual unloading and reloading a part, and virtual reloading of the whole, as far as unloading and reloading were necessary for the purpose of ascertaining and paying the duties at that port, which accord-

---

(*b*) 15 East, 46, *ante*, p. 158.
(*b*) 2 Bos. & Pull. 153.
(*d*) 4 Taunt. 628.
(*f*) 16 East, 176.
(*a*) 2 Taunt. 416.
(*c*) 2 Taunt. 416.
(*e*) 2 M. & S. 106.

ing to the policy is to be regarded as the loading port. So, also, in the case of *Bell* v. *Hobson*, (*a*) where a policy was on goods at and from *Gottenburg*, to take in and discharge goods wherever the ship may touch at, declared it to be in continuation of former policies. The defendant was not an underwriter on the former policies, and the goods insured were in fact loaded at *Virginia;* the Court thought this memorandum indicated that the prior loading was in the contemplation of the parties.

And in the case of *Gladstone* v. *Clay*, (*b*) where the word "wheresoever" was added thus, beginning the adventure upon the said goods from the loading thereof on board wheresoever, the Court thought this word sufficient to cover the loading wheresoever it should take place, and to draw the case out of the construction put on former cases, and, therefore, where goods were insured "at and from *Pernambuco* to *Maranham*, and at and from thence to *Liverpool* from the loading thereof on board the said ship, wheresoever, &c." the goods were loaded at *Liverpool* to be delivered and sold at *Pernambuco*, and the ship was to be sent back to *London:* and the goods were sold at *Pernambuco*, except twenty-six cases, which were sent in the same ship to be disposed of at *Maranham*, together with other goods to be carried to *Maranham* and thence to *Liverpool* on the plaintiff's account: the twenty-six cases were not unloaded but remained on board till the loss which happened between *Pernambuco* and *Maranham:* it was held that the policy covered the twenty-six cases.

But where the assured have by the express terms which they have used in the policy confined the risk to *the "goods from the loading thereof" at a particular place, still, although there may be reason to believe [*195] that the intention of the assured was to protect the goods actually on board at the time of the loss, whether belonging to the outward as well as the homeward voyage, the Court will not feel itself at liberty to give effect to their intention, but in the construction of the policy it will be guided by the express terms they have used.

And therefore, in the case of *Rickman* v. *Carstairs*, (*c*) where a ship was bound on a bartering expedition, and an insurance was made on goods "beginning the adventure from the loading thereof on board the said ship twenty-four hours after her arrival on the coast of *Africa*," and a loss took place when a portion of the goods of the outward voyage was on board and a considerable portion of the homeward not shipped at the time, it was held that the policy did not cover that portion of the goods of the outward voyage on board at the time, notwithstanding by a memorandum annexed to the policy the insurance was declared to be on the cargo valued at a certain sum, and that the part of the outward cargo then remaining on board, together with the portion already shipped, made up the valuation in the policy, and that the policy was to be opened and the assured was to recover only a proportion of the value estimated on the part of the homeward cargo shipped at the time. And Lord *Denman*, C. J., delivering the judgment of the Court said, "In this case it is with regret we find ourselves obliged to come to the conclusion that the plaintiffs are not entitled to recover for a total loss; because it appears very likely that the assured intended by this policy to insure both the outward and the homeward cargo, and to have valued both; inasmuch as a great part of the outward cargo would, in such a voyage remain on board, and would be continually varying in the course of barter, and nothing is more probable than that the entire cargo should be valued, to prevent difficulty of valuation, in the case of

(*a*) 16 East, 240.
(*b*) 1 M. & S. 418.
(*c*) 5 B. & Ad. 651.

[*196] *a loss. Unfortunately, however, they have used words, which will not, we think, effectuate that intention. The question in this and other cases of construction of written instruments is, not what was the intention of the parties, but what is the meaning of the words they have used. The cases of *Robertson* v. *French*, (*a*) *Spitta* v. *Woodman*, (*b*) *Langhorne* v. *Hardy*, (*c*) and others have established, that where the policy is upon goods, "from the loading thereof" either from a particular place, or in blank upon a voyage from one place to another, it does not attach upon goods previously on board; but this being a strict construction, has been relaxed when there was anything on the face of the instrument to satisfy the Court that the policy was intended to cover goods previously on board. (*d*) The question then is, whether there is any thing disclosed upon the face of this policy by which the Court can be convinced that it was intended to attach upon the outward cargo, the nature of the voyage, of which the underwriter must be presumed to be cognizant, being also taken into consideration?

"The only circumstance which can have this effect, is the memorandum, which declares the insurance to be 'on the cargo valued at 4800*l.*' and it occurred at one time to a part of the Court that this raised a presumption that the parties contemplated such a cargo to be the substance of the insurance as was capable of being valued at the full amount insured when the policy attached, *i. e.* when the ship had arrived twenty-four hours on the coast of *Africa*, and that the entire cargo, consisting of outward and homeward goods, would alone answer that description. If this were clearly the meaning of the clause we agree that we might reject or qualify the words 'from the loading thereof on board the ship,' as we certainly might have done, if it had been said expressly [*197] in the memorandum, that the insurance *was on the cargo both outward and homeward, valued at 4800*l.* But the difficulty is to make out that this is the meaning of the memorandum in question. Suppose the words of the memorandum had been 'on the homeward cargo' valued at the same sum, would there have been any inconsistency in making such a valuation, and would the fact therefore of making such a valuation enable the Court to say that the word homeward must be rejected, and the insurance applied to the whole of the goods on board? Or suppose that in the earlier part of the policy, the insurance had been 'upon any kind of goods and merchandizes, laden on board, after twenty-four hours after arrival on the coast of *Africa*,' would the valuation by the memorandum in any way have qualified or varied the subject of insurance? If it would not, neither can it in the present case; for the declaration in the policy, that the adventure is to begin 'from the loading thereof on board twenty-four hours after such arrival' is in effect the same thing, and confines the insurance to the homeward cargo."

There is a class of cases which may properly enough be mentioned in this place, which establish a well-known principle in the law of marine insurance, and which we shall have to consider further in the next section, viz: that the Courts of Law have always, in putting a construction upon policies, been guided by the custom and usage of trade.

There is one case, which has already been referred to, of this description, viz: the case of *Pelly* v. *Royal Exchange Assurance Company*, (*a*) in which it was decided by Lord *Mansfield*, that where the rigging and tackle of a ship were put on shore, during a repair, in a *Chinese* voyage, in the usual course

(*a*) 4 East, 130. (*b*) 2 Taunt. 416.
(*c*) 4 Taunt. 628.
(*d*) As in Bell v. Hobson, 16 East, 260, and Gladstone v. Clay, 1 M. & S. 418.
(*a*) 1 Burr. 341, *ante*, p. 137.

of that voyage, and were burnt by accident, the underwriters were held liable. The reader is referred to Lord *Mansfield's* judgment, quoted at length in the former part of this Treatise. (*a*)

In another instance, of *Lethulier's* case, (*b*) which was an *action on a policy of insurance, underwrote by the defendant at [*198] *London*, by which a ship was insured from thence to the *East Indies*, warranted to depart with convoy, the declaration showed that the ship went from *London* to the *Downs*, and from thence with convoy, and was lost. After a frivolous plea and demurrer, the case stood upon the declaration, and it was objected that there was not a departure without convoy. But, by the Court, the clause, "warranted to depart with convoy," must be construed according to the usage among merchants, that is, from such place as convoys are to be had, as the *Downs*. In this case Lord Chief Justice *Holt* differed from the rest of the Court; the late Mr. J. *Park*, however, says, that his Lordship's opinion is certainly contradicted by practice, it being almost the invariable custom for the convoy to meet the merchant ships only in the *Downs*. (*a*)

In the cases of *Gordon* v. *Morley*, and *Campbell* v. *Bordieu*, (*b*) on an insurance from *London* to *Gibraltar*, warranted to depart with convoy, it appeared that there was a convoy appointed for that trade at *Spithead*, and the ship *Ranger*, having tried for convoy in the *Downs*, proceeded to *Spithead*, and was taken in her way thither. The assurers insisted that this being the time of a *French* war, the ship should not have ventured through the *Channel*, but have waited in the *Downs* for an occasional convoy; and many merchants and office-keepers were examined to that purpose. But the Chief Justice held, that the ship was to be considered as under the defendant's insurance, as going to a place of general rendezvous; and if the parties meant to vary the insurance from what is commonly understood, they should have particularized her departure with convoy from the *Downs*. The juries were composed of merchants, and in both cases found for the plaintiffs, upon the strength of this direction.

So in the case of *Bond* v. *Gonzales*, (*c*) which was an action upon a policy of insurance, which was to insure the *William* galley, in a voyage from *Bremen* to the port of *London*, *warranted to depart with convoy. [*199] The case was, the galley set sail from *Bremen*, under convoy of a *Dutch* man-of-war, to the *Elbe*, where they were joined by two other *Dutch* men-of-war, and several *Dutch* and *English* merchant ships, whence they sailed to the *Texel*, where they found a squadron of *English* men-of-war, and an admiral. After a stay of nine weeks, they set sail from the *Texel:* the galley was separated in a storm, taken by a *French* privateer, and retaken by a *Dutch* privateer, and paid eighty pounds salvage. It was ruled by *Holt*, Chief Justice, that the voyage ought to be according to *usage*, and that their going to the *Elbe*, though out of the way, was no deviation; for till after the year 1703, (prior to which time this policy was made) there was no convoy for ships directly from *Bremen* to *London*.—Verdict for the plaintiff.

The case of *Motteux and others* v. *The Governor and Company of the London Assurance* (*a*) was a bill filed in the Court of Chancery, which stated that the ship *Eyles*, late in the *East India* Company's service, was, in the year 1732, at *Bengal*, at which time the owner employed I. H. to insure the ship in the *London Assurance Office* for five hundred pounds. The adventure thereon was to commence from her arrival at *Fort Saint George*, and thence

(*a*) 1 Burr. 341, *ante*, p. 137.
(*b*) 2 Salkeld, 443; and see Warwick v. Scott, 4 Camp. 62.
(*a*) Park Ins. 89. (*b*) 2 Strange, 1265.
(*c*) 2 Salk. 445. (*a*) 1 Atk. 545.

to continue till the said ship should arrive in *London*, and that it should be lawful for the said ship, in the said voyage, to stay at any ports or places without prejudice, and that the ship was and should be rated at interest or no interest, without further account: in consideration whereof I. H. paid fifteen pounds premium. The *Eyles* came to *Fort Saint George*, in *February*, 1733, in her way to *England;* but being leaky, and in a very bad condition, upon the unanimous advice of the governor, council, commanders of ships, &c., she sailed to *Bengal* to be refitted, and after being sheathed, in her return upon her homeward-bound voyage, she struck upon the *Engilee* sands, and was lost.

[*200] Evidence was read on the part of the plaintiffs *to prove that *Bengal* was the most proper place to refit, and that she went thither for that reason; that this was a voyage of necessity, and not a trading voyage, for she took nothing on board but water, provision, and ballast.

Lord Chancellor *Hardwicke.*—"As to the question, whether there has been a breach, or, in other terms, a loss, within the meaning of this policy? the general principles laid down by the plaintiff's counsel are right: that stress of weather, and the danger of proceeding on a voyage, when a ship is in a decayed condition, are to be considered. In such a case, if she went to the nearest place, I should consider it equally the same as if she had been repaired at the very place from which the voyage was to commence, according to the terms of the policy, and no deviation. It is a very material circumstance, that the governor ordered the lading to be taken out, to show the necessity of the ship's being repaired; but there is not a syllable of proof why she might not have been equally well repaired at *Fort St. George.* There is one part of this case which distinguishes it from all others whatever, and that is, as to the certain time the voyage was to commence. The fact is, the ship was lost in *July*, 1733, three weeks before the time of making this policy, so that clearly the ship was not at *Fort St. George* at the time the agreement was made; and therefore it is a material question whether it comes within the agreement." His Lordship directed an issue to try whether the loss in *July*, 1733, was a loss during the voyage, and according to the adventure agreed upon; which issue was afterwards found for the plaintiffs, upon a trial in the Common Pleas.

In the case of *Tiernay* v. *Ethrington*, (*a*) which was an action upon a policy of insurance "on goods in a *Dutch* ship, from *Malaga* to *Gibraltar*, and at and from thence to *England* and *Holland*, both, or either: on goods, as hereunder agreed, beginning the adventure from the loading, and to continue till the

[*201] ship and goods be arrived at *England* or **Holland*, and these safely landed." The agreement was, "that upon the arrival of the ship at *Gibraltar*, the goods might be unloaded, and reshipped in one or more *British* ship or ships for *England* and *Holland*, and to return one per cent., if discharged in *England.*" It appeared in evidence, that when the ship came to *Gibraltar* the goods were unloaded, and put into a store-ship, (which it was proved was always considered as a warehouse) and that there was then no *British* ship there. Two days after the goods were put into the store-ship, they were lost in a storm. The question was, whether this was a loss within the construction of the policy?

Lee, Chief Justice.—"It is certain that in the construction of policies, the *strictum jus*, or *apex juris*, is not to be laid hold of: but they are to be construed largely, for the benefit of trade, and for the insured. Now it seems to be a strict construction, to confine the insurance only to the unloading and reshipping, and the accidents attending that act. The construction should be according to the course of trade in this place; and this appears to be the usual

(*a*) 1 Burr. 348.

mode of unloading and re-shipping in that place, viz: that when there is no *British* ship there, then the goods are kept in store-ships. Where there is an insurance on goods on board such a ship, that insurance extends to the carrying the goods to shore in a boat. So, if an insurance be of goods to such a city, and the goods are brought in safety to such a port, though distant from the city, that is a compliance with the policy, if that be the usual place to which the ships come. Therefore, as here is a liberty given of unloading and re shipping, it must be taken to be an insuring under such methods as are proper for unloading and re-shipping. There is no neglect on the part of the insured, for the goods were brought into port the nineteenth and were lost on the twenty-second of *November*. This manner of unloading and re-shipping is to be considered as the necessary means of attaining that which was intended by the policy, and seems to be the same as if it had happened in the act of unshipping from one ship into another. And as this is the known course of the trade, it seems extraordinary *if it was not intended. This is not to be considered as a suspension of the policy; for as the policy would [*202] extend to a loss happening in the unloading and re-shipping from one ship to another, so any means to attain that end come within the meaning of the policy."

The plaintiff had a verdict.

Afterwards a new trial was moved for; but it was refused by *Lee*, Chief Justice, Mr. Justice *Chapple*, and Mr. Justice *Denison*, against the opinion of Mr. Justice *Wright*. (*a*)

In the case of *Bold and another* v. *Rotherham and others*, (*b*) which was an action on a policy of insurance on "goods by the ship *Penang*, from *Liverpool* to *China*." At the time of making the policy, the relations between this country and *China* were in a disturbed state, and the policy was, therefore, drawn up in a mode to allow every facility to the assured to look out and wait for a market. The insurance was "on goods" by the ship *Penang*, "at and from *Liverpool* to any port or ports in the *Canton River*, or on the coast of *China*, including *Manilla*, with leave to remain at an out-port until she could get to a desired port, with leave to call at any port or ports for instructions or in the way of traffic." The ship sailed on the 31st *October*, 1840, and on *January* 25th, being then in the *Indian Seas*, she met with bad weather, was dismasted, the maintopsail-yard coming down stove a hole in her deck, through which she shipped a quantity of water, and a large portion of the cargo was consequently damaged. The captain thought it best to run for *Singapore*, which he reached. The vessel was then refitted, but the cargo was not taken out, owing to the heavy duties which would have been incurred. The *Penang* sailed again in *April*, and arrived at *Macao* on the 22nd *June*. On that day Captain Elliott, the Plenipotentiary, issued a notice that it was not safe for *British* ships to remain in the river, and recommended them to go to *Hong Kong*. The correspondents of the owners at *Canton* directed the captain to proceed thither, *and sent with the *Panang* a vessel called *The James Lang*, which was to be used as a receiving ship, and into [*203] which the cargo was to be transhipped, for the purpose of ascertaining the damage and preventing further deterioration of the cargo. The two vessels arrived at *Hong Kong*, and the transhipment was proceeded with. The crews were engaged in transhipment about seven days, and about 1,300 bales out of 1,500 (the cargo) had been received by the *James Lang*, when the latter

(*a*) Easter Term, 1743.

(*b*) Tried before Lord Denman, C. J., at Liverpool Summer Assizes, 1842. MSS. *penes me*.

vessel was driven on shore in a typhon, was totally lost, and the cargo washed way amongst the rocks. On behalf of the assured, it was contended that the goods could not be supposed to have arrived at their final destination by the transhipment at *Hong Kong*, that there were no warehouses at *Hong Kong*, and that the transhipment was merely effected for the purpose of ascertaining the amount of damage, and for preventing a further deterioration. It was admitted that there was no intention of re-shipping the goods into the *Penang*. His Lordship left it to the jury to say, whether they were of opinion that the goods, by being put on board the *James Lang* at *Hong Kong*, under the circumstances, were to be considered as having been deposited at their final destination as completing the adventure, so far as the *Penang* was concerned. The jury finally found a verdict for the plaintiffs. (*a*)

So also in another case, of *Noble and others* v. *Kennoway*, (*b*) the same principles were adhered to, and the same rule of decision was adopted. The insurance was upon the ships the *Hope* and the *Anne*, at and from *Dartmouth* to *Waterford*, and from thence to the port or ports of discharge, on the coast of *Labrador*, with leave to touch at *Newfoundland*, and upon any kinds of goods and merchandises; and also on *the ships, till they should [*204] be arrived at their port of discharge, and should have moored at anchor twenty-four hours, and on the goods until the same shall be there discharged, and safely landed. By a clause in the policy, money advanced to the fisherman was insured. The *Anne* arrived safe on the coast of *Labrador* on the 22nd of *June*, and the *Hope* on the 14th of *July*, 1778. From the time of their arrival, the crews were employed in fishing, and had taken out none of their cargoes, except at leisure hours, (partly on *Sundays*) such things as were immediately wanted. On the 13th of *August*, an *American* privateer entered the harbour, and took both the vessels, there being at that time nobody on board either of them. The action was brought to recover the value of the goods. The defence was, that there had been an unnecessary delay in unloading the cargoes, in consequence of which they had been exposed to capture, and that the underwriters ought not to be liable for what had happened from the negligence of the insured. The plaintiffs rested their case on the words of the policy, and the usage of the trade. They called the captain of the *Anne*, who swore that he had been the same voyage three times in the three last years, and that they had proceeded in the same manner during each of the voyages; that he did not think the plaintiffs had warehouses sufficient to have held the goods if they had been landed; and that there were no settlements on the coast of *Labrador*, but those belonging to the plaintiffs. One of the sailors swore to the same effect. The plaintiffs then called one *French*, to prove the custom of the *Newfoundland* trade. This evidence was objected to; but Lord *Mansfield* admitted it, and the witness swore, that in the *Newfoundland* trade it is customary to keep their goods on board several months, and that sometimes they have part of their homeward cargo of fish, and part of their old cargo on board, at the same time. That the first object is to catch fish, and they unload only at times when they cannot fish. The old cargo being chiefly salt and provisions, it is taken out gradually for curing the fish, and for consumption. The testimony of this witness *was confirmed by one *Newman*. [*205] Neither *Newman* nor *French* had been at *Labrador*. Mr. Hun-

(*a*) See with reference to the above case, the immediately preceding case of Tiernay v. Ethrington, 1 Burr. 348. See also the cases of Pelly v. Royal Exchange Company, 1 Burr. 341, *ante*, p. 137. And likewise the case of Waples v. Eames, 2 Strange, 1243, *ante*, p. 157, and particularly the arguments of Lord Mansfield, in Pelly v. Royal Exchange Company, and of C. J. Lee, in the case of Tiernay v. Ethrington.

(*b*) Doug. 510.

ter was then called, who proved, that some years since he used to send vessels of his own, and also chartered vessels, to *Labrador*, and that it was usual, in chartering vessels, to stipulate that they should have sixty days allowed for discharging. That he apprehended they were oftentimes longer in fact, and that it was not so easy to discharge a cargo at *Labrador* as at *Newfoundland*. Upon this evidence a verdict was found for the plaintiffs, and in the subsequent Term the defendant moved to set it aside, which was not granted.

Lord *Mansfield*.—"The trade of fishing on the coast of *Newfoundland*, especially from the west of *England*, has been known and practiced for many years. Since the treaty of *Paris*, a new trade has been opened to *Labrador*. The insurance here is on the ships, and on the goods till landed. The defendant says, the plaintiffs have been guilty of an unreasonable delay in landing. That question was to be tried by the jury, and could only be decided by knowing the usual practice of the trade. Every underwriter is presumed to be acquainted with the practice of the trade he insures, and that whether it is recently established or not. If he does not know it, he ought to inform himself. It is no matter if the usage has been only for a year. This trade has existed, and has been conducted in the same manner for three years. It is well known that the fishery is the object of the voyage, and the same sort of fishing is carried on in the same way at *Newfoundland*. I still think the evidence on that subject was properly admitted, to shew the nature of the trade. The point is not analogous to a common law custom."

So in a case of *Ougier* v. *Jennings*, (*a*) before Lord *Eldon*, when Chief Justice of the Common Pleas, his Lordship allowed the usage of trade to protect an intermediate voyage to *Sidney* from *Newfoundland* in ballast, and back with a *cargo of coals, upon an insurance on fish on the ship *Duchess of Gordon* at and from *Newfoundland* to a port in *Portugal*. The ship had arrived at *Newfoundland* in *July*, she then proceeded to *Sidney* for coals, arrived there in *August*, and delivered her coals at *Newfoundland* in *October*; she then loaded her fish, and sailed for *Oporto* in *November*, and was lost. The underwriters insisted that the trip to *Sidney* should have been communicated to the underwriters, as it tended, by retarding the commencement of the voyage insured, to increase the risk. The plaintiff relied on the usage of trade, which was proved by several witnesses. [*206]

Lord *Eldon*.—"I think the practice in this case is as capable of being received, as in other cases, in which it has been admitted. This is like the case of the ship that was employed on the *Labrador* coast, where she fished after her arrival, and before her outward cargo was discharged. There is no doubt that the policy *primâ facie* means the first cargo, which shall be laden after the ship's arrival: but the underwriter must refer himself to the usage of the trade, which he is bound to know. The first question is, whether there be such an usage? If the evidence leads to this, that the ship may make an intermediate voyage of several years, it is too dangerous for you (the jury) to give it effect. If several ships belonging to a merchant arrive together at *Newfoundland*, and finding cargoes for some only, he *bonâ fide* sends the rest on an intermediate voyage, it seems reasonable; though studiously sending a ship on an intermediate voyage out of her turn would be a deviation. If you think the usage does exist: if you think it reasonable; and if you think this ship acted *bonâ fide* in taking the intermediate voyage, you will find for the plaintiff." The jury did so, and the verdict was not impeached.

So in the case of *Vallance* v. *Dewar*, (*a*) where Lord *Ellenborough* held, that in a common insurance on ship, freight, and cargo, at and from any port

---

(*a*) Sit. in C. P. 1800, 1 Camp. 505, note (*a*); and see Phillipps v. Irving, 8 Scott, N. R. 3; and *ante*, p. 117, and *post*.

(*a*) 1 Camp. 503.

[*207] or ports in *Newfoundland*, *to one port of discharge in *Portugal*, or to any port or ports in the *United Kingdom*, it is not necessary to communicate to the underwriters, that before that risk commences, the vessel will be employed either in fishing, (called banking) or in an intermediate voyage, for the usage of that particular trade covers it, and the underwriters are bound to know the nature and circumstances of the trade, to which their policy relates. His Lordship added, the assured is not bound to make a laborious disclosure of what is known to all. It is notorious that in this trade, upon their arrival, ships are either employed in banking, or take an intermediate voyage. If so, it must be presumed to be equally in the knowledge of both parties. According to the general import of the words "at and from," the policy would attach upon the ship's first mooring on the coast; but it may doubtless be explained differently by usage: and as between these parties the policy must be taken to be the same, as if it had been expressed to attach upon the expiration of the banking or intermediate voyage. The underwriters were not liable for any antecedent loss, and cannot complain of what was previously done as a deviation. Although there should be exceptions to the usage, that would be immaterial. Things are presumed to go on in their ordinary course; and if an usage be general, though not uniform, the underwriters are bound to take notice of it.

So the same learned Judge, in the case of *Kingston* v. *Knobbs*, (*a*) held, on an insurance from *Oporto* to *London*, where the ship having taken in part of her cargo within, went to take the remainder without the bar; and where several witnesses proved that it had been usual to do so, that the underwriters were bound of themselves to take notice of the usage; although it appeared that sometimes in policies, express liberty was given to load on either side of the bar.

[*208]

*SECTION VII.

IT SHALL BE LAWFUL FOR THE SHIP, ETC., TO TOUCH AND STAY, ETC.

The head of this section includes the words for making "it lawful for the said ship, &c., in this voyage, to proceed and sail to, and touch and stay at any ports or places whatsoever—without prejudice to this insurance."

This liberty to touch and stay at different parts in the voyage insured is always inserted in the printed policies, and generally made use of by the assured's filling up the blank space as it suits them. This clause has always been used with the greatest effect in voyages to the *East Indies*, and *China*, round the *Capes*, and to the islands in the *West Indies*, as well as to the continents of *America;* and some care and precision is requisite that the object of the voyage is well attained, by the terms adopted in this part of the policy by the assured: the truth of which we shall have to shew in many cases in which this clause has come in question. Previous, however, to our giving our consideration to the many recent decisions which have taken place in our Courts of Law upon this clause, after it has, by the great increase and extension of commerce and navigation, been almost constantly used in insurances on the long and important voyages to all parts of the globe, it will be advisable for us to turn our attention, in the first place, to the earlier decisions, which have laid

---

(*a*) 1 Camp. 508, *in notis*.

the foundations of the law upon this subject, on which the recent cases in a great degree depend; and which legal decisions arose out of the immense trading and commercial enterprise which followed the acquisition of our now extensive territories in the *East*, and in the foundation of the government of the *East India Company* there. And I shall quote the words of that learned author, the late Mr. J. *Park*, who, of all others, had the best opportunity of observing the *effect the great flow of mercantile [*209] speculation towards that part of the world, had upon the contract now under our consideration; and which, under the talented guidance of the Judges of that period, (particularly under the masterly hand of that great founder of insurance law, Lord Chief Justice *Mansfield*.) was soon converted into a system which constituted one of the greatest assistance, protection, and encouragement to the numerous speculators, who embarked their property on bottoms bound for that distant and hazardous market.

It is under the term "voyage" in this clause, that the law which was created in the reign of his late Majesty Geo. 3, relating to the "*East Indian* voyages," and what were called the "country voyages," is to be treated of; I shall commence however, by the quotation I have alluded to, from the learned and most excellent treatise of the late Judge. He says,—"Although the decisions in all the above causes, (*a*) notwithstanding the vast variety of circumstances that are to be found in them, are so uniform in principle; and although we find, that the learned Judges make a constant reference to the usage of trade; yet in no instance whatever has this been so apparent as in the case of insurance upon *East India* voyages, in which the insurers have been held liable, not only for events which may possibly happen from the port of discharge to that of delivery; but also for all intermediate or country voyages, upon which the ship may be despatched by the order of the council of any of the *East India Company's* settlements abroad."

In the cases of *Grant* v. *Paxton*, and *Grant* v. *Delacour*. (*b*) Chief Justice *Mansfield*, after stating the declaration and facts in the first of these cases, proceeded—"No reason was given, or at least none appeared upon the evidence, why the *Brunswick* did not proceed directly to *London*, and why the plaintiff did not reship his own goods for *London* on board of her. The fact only was proved that the East India Company *sent the *Brunswick* to *Canton*, not for their own benefit, but the plaintiff applied [*210] to them that he might go to *Canton* with an adventure of his own, and permission was granted him upon the terms that the Company should take in goods for themselves at *Canton*, but that they should pay no part of the freight on the outward voyage from *Bombay* thither. On the voyage the *Brunswick* was taken. The plaintiff first sued *Delacour* upon a policy made upon the whole voyage out and home, and in that cause an argument was used with considerable effect, that the Company, who had been very indulgent to the plaintiff in permitting him to take this voyage, would probably have been less so, if they had considered the consequence; for they would raise the price of insurance against themselves, since the underwriters would not hereafter insure at the usual premium, a voyage which might by the favour of the Company to the captain, be prolonged beyond the full end of the twelve months next after the time sufficient for the voyage which was first contemplated. But it was impossible not to say that the plaintiff must recover upon that policy. The words of it were most extensive. It was on goods laden in *London*, and to continue on the same goods, which literally taken would be absurd, for the goods are taken out for the purpose of trading and barter, not to be brought

(*a*) Mentioned at the close of sec. vi. (*b*) 1 Taunt. 463.

home again in specie. The policy was "at and from *London*, to all ports and places on this side, and on the other side of the *Cape of Good Hope*, forwards and backwards at sea, at all times, on all services, and in all ports and places, until the ship's safe arrival back again at her last station at *Blackwall* or *Deptford*, upon any kind of goods in the *Brunswick*, beginning the adventure upon the said goods from the loading thereof, on board the said ship at *London*, including the risk in craft from the ship to the shore, and so shall continue," &c. The Court held that these words, though literally applying only to the goods laden in *London*, must be intended to apply to any goods brought back to *London*, though they were not the same goods. Consequently, under that policy, the captain had a *right to trade with his outfit as often as he would, and the insurance attached upon any goods, which he might acquire in the course of his dealing, and endeavour to bring back to *England*.

[*211]

But in this case the words very materially differ. The policy is "upon goods at and from *China* to all or any ports or places whatsoever and wheresoever in the *East Indies*, *Persia*, or elsewhere, beyond the *Cape of Good Hope*, in port, and at sea, in all places, at all times, and in all services, until the ship's safe arrival in *London*, (not at the last place of discharge, an expression which was relied on, in the former case, for the plaintiff, as indicating that the ship was to discharge her cargo more than once;) beginning the adventure upon the said goods from the loading thereof on board the said ship at *China*, and to continue until the said ship with all her ordnance, &c., and goods and merchandises whatsoever, should be arrived at *London*, including the risk in craft from the ship to the shore, and upon the goods and merchandises, until they should be discharged and safely landed." Taking the words of this policy, nothing can be clearer, than that the goods, insured by it, are the goods to be put on board at *China*, and not elsewhere, on the voyage from *China* to *London*. But inasmuch as the Company may employ the ship, while under their hire, in any service, the words "to all or any places, in and at sea, in all places, at all times, and all services," are inserted to the intent, that although the ship should be used as a ship of war, or in whatsoever employment she might be, or whithersoever the Company should send her, still the policy should cover these goods. The Company, it is true, send back the *Brunswick* on another voyage, but this circumstance does not alter the words of the policy, or enlarge the insurance. It might alter the effect of the policy, if there were any custom of the trade to warrant it; but not only none such is found, but it is disaffirmed by the circumstances of this case, which shew that the turning out of these goods at *Bombay* was owing to the interposition of an extraordinary accident. It never was *in the contemplation of the underwriters, or of any man, that a ship once laden with tea, a very valuable cargo, would be unloaded, and employed in war, or some other trade. If, then, there is no custom of the trade, there is nothing to alter the plain, fair, grammatical sense of the words. In the other policy, the words "backwards and forwards at sea" had considerable force. The plaintiff's counsel in this case contended that according to a dictum of Lord *Mansfield*, those words meant only from *Europe* to *Asia*, and from *Asia* to *Europe*. But this is a most unnatural interpretation: the words "backwards and forwards at sea" must mean from port to port. It was said by Lord *Mansfield*, in the case of *Gregory* v. *Christie* (*a*) "that since the practice had ceased of insuring the outward and homeward voyage in one policy, the words "backwards and forwards" had ceased to be inserted, but in the case of *Salvador* v.

[*212]

(*a*) B. R. Trin. 24 Geo. 3.

Hopkins, (*b*) the insurance was "at and from *Bengal* to any ports or places where and whatsoever in the *East Indies*, *China*, *Persia*, or elsewhere, beyond the *Cape of Good Hope*, forwards and backwards, and during her stay at each place, until her arrival at *London*." There the words must have had the meaning attributed to them in *Grant* v. *Delacour*, that is from port to port, not from *Europe* to *Asia*.

This discussion no further concerns the present question, than to shew that the case of *Grant* v. *Delacour* does not govern this. The distinction between them is that there, by necessary construction, all the goods which might be acquired by trading in the course of the voyage were protected by the policy: in this case the insurance is on nothing but the goods laden in *China*, and is to continue on them till the arrival of those goods at *London*. On the true construction of this instrument, therefore, we must pronounce that the voyage from *Bombay* to *China* was not within the meaning of the policy, nor the lost goods covered by this insurance."

Mr. Justice *Park* thus proceeds in the passage I began to *quote: [*213] "It is not that, in these cases, the Judges have given a greater latitude to the usage of trade, than in any other; but because, from the great variety of cases that have arisen upon the subject, the usage with regard to the *East India* voyage is more notorious and better established than in those where the question has but seldom occurred. The grounds and reasons of such decisions seem to have been the terms in which all the printed charter-parties of the *East India Company* are conceived. By those charter-parties, liberty is given to prolong the ship's stay for a year; besides which, it is very common, by a new agreement, to detain her a year longer; and the longer a ship is kept it is the more beneficial to the owners. The words of the policy, too, are adopted to this usage, being without limitation of time or place, and without any reference to the first voyage particularly mentioned in the charter-party. These charter-parties, being printed, are matter of public notoriety; and are so generally and universally known, or may be so, by an inquiry at the *India House*, that the chance of her stay is always one of the risks insured: and both the insured and insurer must be supposed to be fully apprised and sufficiently conusant of it. Indeed, the understanding of the policy depends so much on the course and usage of the *East India* trade, that it seems to be contradictory to the policy to say, that the underwriter did not underwrite for a country voyage.

"All these principles were fully laid down by Lord *Mansfield* in a very few years after he took upon him the administration of justice in this country; and they have been frequently recognized, and invariably pursued in a multitude of decisions upon such policies since that time. The learned Chief Justice, when he laid down these rules as the ground of his then opinion, and as the guide of future decisions, said he did so, because the Court esteemed this to be the most convenient way of determining the question; for whoever should thereafter insure on an *East India* ship would know, that he insured the contingencies, and might take proper precautions against them if he pleased. Whereas if every person should *be obliged to open to the insurer all the grounds of his expectation about the ship's continuance in the *East* [*214] *Indies*, or coming to *England*, it might produce great litigation and confusion in cases arising upon these policies."

The cases, in which these principles as to *East India* voyages were first settled, *Salvador* v. *Hopkins*, (*a*) were the nine causes tried upon the ship *Winchelsea* an *East Indiaman;* in all of which the policies were the same,

(*b*) 3 Burr. 1707.

(*a*) 3 Burr. 1707.

the parties only being different; and all of which were at first tried with various success; but the nine verdicts were ultimately uniform for the plaintiffs, the assured, against the underwriters.

The charter-party was in the usual printed form, and contained a clause, empowering the Company's servants abroad to detain the ship a year longer, if they pleased, than the time originally limited by charter-party. The insurance was in these words, "at and from *Bengal*, to any ports or places whatsoever in the *East Indies*, *China*, *Persia*, or elsewhere, beyond the *Cape of Good Hope*, forwards and backwards, and during her stay at each place until her arrival at *London*, on money," &c. On the 25th of *March*, 1762, the ship sailed; on the 19th of *September*, in the same year, she arrived at *Bombay:* and early in the *November* following, she left *Bombay* the first time. The ship arrived at *Calcutta*, in *Bengal*, on the 5th of *March*, 1763; and on the twenty-eighth of the same month, the president and council of *Bengal*, entered into a new agreement with the captain, reciting that the charter-party would expire on the 11th of *February*, 1764, but that the president and council, finding it expedient to detain the ship in *India*, and being desirous of having the time limited in the charter-party prolonged, &c., the indenture therefore witnesseth, that the captain lets the ship to freight for one whole year from the said 11th of *February*, 1764. The ship arrived at *Bombay* a second time in *July*, 1763: in *December* following, she again sailed for *Bengal*, and arrived there early in 1764; on the 19th of *March* in *that year she left *Bengal*, [*215] in order to proceed for *Bombay*, and on the twenty-first of that month, subsequent to the expiration of the old charter-party, the ship was lost. On the third of *April*, 1764, Mr. *Hume*, the plaintiff in several of these actions, received a letter from the captain, dated the 14th of *April*, 1763, inclosing a copy of the new agreement; which letter was publicly read in a coffee-house. The next day after the receipt of the letter, some insurances were made by Mr. *Hume*. On the 17th of *July*, 1764, other insurances were effected by Mr. *Hume*, and all the other insurances were made, after the captain's letter of the 14th of *April*, 1763, had been received and publicly read in a coffee-house.

The Court, after laying down all those principles above stated respecting the notorious usage of this branch of trade, enlarged upon the circumstances peculiarly distinguishing these causes. "No mention was made, or question asked, at the time of underwriting, when the ship was chartered, when she sailed from *England*, when she arrived in *India*, whether she was detained a year, according to the proviso in the charter-party: and yet her continuance in the *East Indies* depended upon all these facts. If they ought necessarily to be disclosed, the policy was void. to the knowledge of the underwriters, at the time they took the premium. The evidence in all the causes was very strong, and her staying a year longer, if known, would not have varied the premium. This ship was insured at the same premium, after the prolongation of her stay in *India* was known. None of the defendants desired to be off, after they knew that an account of the new agreement had been received in *England*, upon the 3d of *April*, 1764, which was notorious to them all, before the intelligence of her loss, which came in the *October* following. So that if there had been any force in the objection, it would have been waived by the acquiescence of the underwriters, after they were fully apprized of the whole."

So, also, in the case of *Gregory* v. *Christie*, (*a*) in an action upon a policy "on the goods, specie, and effects of the *plaintiff, on board the [*216] ship on her voyage from *London* to *Madras* and *China*, with liberty to touch, stay, and trade at any ports or places whatsoever," a similar

(*a*) R. R. Trin. 24, Geo. 3. Park Ins. 104.

question arose upon the following facts. When the ship arrived at *Madras*, she was too late to go to *China* that year; upon which she was employed by the council there to go from *Madras* to *Bengal* to fetch rice, which voyage she performed once, and, in attempting to perform it a second time, was lost. The jury found a verdict for the plaintiff.

A new trial was afterwards moved for on two grounds, one of which only is material here, that these intermediate voyages were not insured under the policy; for that the words "to touch, stay, and trade at any ports or places whatsoever," only meant to give a license to stay at such places as it should be necessary to stop at in the course of the voyage.

Lord *Mansfield*.—"To understand this policy you must refer to the course of trade to which it relates. What is the course of trade with the *East India Company?* If an *India* ship come to *Madras* too late in the season to proceed to *China*, the council employs her in an intermediate voyage. It is beneficial to all parties so to employ her; the underwriters are perfectly well acquainted with this usage, and are bound to take notice of it. Before the year 1780 it was usual to insure both the outward and homeward bound voyage in one policy, and then the words "backwards and forwards" were inserted; but since that time they have separated the insurance, and insure the outward voyage in a distinct policy. The policy in question differs from others, because it contains a permission to trade, as well as to touch and stay, at any ports or places, which is not usual in policies of this nature: for in general they only permit them to touch and stay, which words can only be intended to give a permission so to do, if necessity oblige them; but to touch, stay, and trade are words so large, that they seem to include the intermediate voyage. It would narrow the construction very much, indeed, to say, that the policy relates to those places only at which they shall stop in the voyage. The words made use of *certainly take in the intermediate voyage, and the usage of trade confirms this construction." The consequence of this opinion was that the verdict of the jury was held to be right. [*217]

So also in *Furquharson* v. *Hunter*, (*a*) an action on a policy of insurance upon the ship *Blandford*, "at and from *London* to *Madras* and *Bengal*, beginning the risk upon the said ship, &c., at *London*, and so to continue till the arrival of the said ship at *Madras* and *Bengal*, with liberty to touch and stay at any port or place in this voyage." The facts were these—the *Blandford* arrived at *Madras*, where her cargo was unloaded by order of the presidency; she was then sent for rice to *Visagipatnam*, and, by an entry in the council-book, her voyage to *Bengal* is said to be postponed. That part of her outward-bound cargo which was intended for *Bengal* was sent thither in the *Lord Mulgrave*, and afterwards the *Blandford* was sent to *Bengal* in ballast, and was taken in the passage; for which loss this action was brought. At the trial, Lord *Mansfield* thought the words in the policy would not admit of such a latitude of construction so as to take in the intermediate voyage, the words being much narrower than those in *Gregory* v. *Christie;* upon which the plaintiff was nonsuited.

However, in the following Term, when a motion was made to set aside the nonsuit, his Lordship said,—"This is a policy on the ship; it is an *India* voyage; and the usage as to the intermediate voyages is notorious to both parties; and the contract refers to it. The insurance here is from *London to Madras* and *Bengal*. What is the usage of the trade? That when the ships arrive at *Madras* the council may send them elsewhere." The other Judges concurred, and the rule for setting aside the nonsuit was made absolute.

(*a*) R. R. Hilary, 25 Geo. 3. Parks Ins. 105.

But the clause giving liberty "to touch, stay, trade." &c., is to be understood with such restrictions as the Courts have thought necessary, to prevent any unfair advantage being taken of the general words in which it is expressed.

[*218] It is, *therefore, always interpreted as subordinate to the voyage insured, which is the principal object of the contract; and in cases of doubt, it must be understood with reference to the laws of commerce, and the usage of the particular trade. It must also be confined to some purpose within the scope of the adventure; whether the purpose be within that scope or not, is a question of law; whether the ship stay an unreasonable time is a question of fact. (*a*)

In *Violett* v. *Allnutt* (*b*) it was held, that liberty to touch at a port for any purpose whatever, includes liberty to touch for the purpose of taking in part of the goods insured. (*c*)

But in *Williams* v. *Shee*, (*d*) where a ship was insured "at and from *London* to *Berbice*, with liberty in the most extensive terms to touch, stay, and trade at all places," &c. The ship arrived with convoy off *Madeira*, and immediately began to land goods, and load wine in exchange; but before the wine could be got on board the convoy sailed. The ship remained at *Madeira* for a week, and then sailed with several others which were in the same situation, but was captured on her way to *Berbice*. Lord *Ellenborough* held that the liberty in the policy must be construed with a reference to the main scope of the voyage; and though there did not appear to have been a wilful desertion of the convoy, the ship, by putting into *Madeira*, and voluntarily staying behind there for the purpose of trade, had been guilty of a deviation which discharged the underwriters.

So in *Hammond* v. *Reid*, (*e*) on a policy from *Para* to *New York*, during her stay there, and at and from thence to *Para*, with leave "to call at all or any of the *Windward* and *Leeward Islands* and colonies on her passage to *New York*, and load and unload there," the Court held that the going to two

[*219] of them, for a purpose entirely unconnected with the voyage, was, *notwithstanding the words of the policy, a deviation, and that the plaintiff was not entitled to recover.

Neither will the liberty "to touch and stay at any ports and places whatsoever," enable the captain to alter the regular course of the voyage, which he must always keep in view. And where a vessel has substantially discharged her cargo at her "final port," the adventure is at an end, and she will not be protected sailing about on a seeking voyage for a fresh cargo.

Thus in *Inglis* v. *Vaux*, (*a*) where an insurance was "at and from *Liverpool* to *Martinique*, and all or any of the *Windward* and *Leeward Islands*, with liberty to touch at any ports or places whatsoever, to take on board and land goods," &c. The ship arrived at *Martinique*, about the 20th of *May*. The captain disposed of all his outward cargo, except a small quantity of lime and bricks. With these he sailed for *Antigua*, where he arrived on the 31st of that month. The ship lay there till the 8th of *July*, where she was lost with the lime and bricks still on board. The captain had not been able to obtain a freight home.

Lord *Ellenborough*.—"The captain had no right to mix up the two objects together, of disposing of the remnant of the outward cargo, and procuring a homeward cargo, at the risk of the underwriters, on the outward voyage.

(*a*) Per Mr. J. Gibbs, in Langhorne v. Allnutt, 4 Taunt. 511.
(*b*) 3 Taunt. 419.
(*c*) And see Barclay v. Stirling, 5 M. & S. 6.
(*d*) 3 Camp. 469. (*e*) 4 B. & A. 72.
(*a*) 3 Camp. 437.

When the disposal of the outward cargo ceased to be the sole object of his stay at *Antigua*, these underwriters were discharged."

And in *Moore* v. *Taylor*, (*b*) where an insurance was made on a ship "at and from *St. Vincent*, *Barbadoes*, and all or any of the *West India Islands*, to her port or ports of discharge, and loading in the *United Kingdom*, during her stay there, and thence back to *Barbadoes*, and all or any of the *West India* colonies, until the ship should have arrived at her final port of discharge as aforesaid." The vessel sailed from *Barbadoes*, and arrived at *Liverpool* in *June;* she took in her cargo, of which a part consisted of fifty tons of coals *in bulk, and fifteen thousand common bricks. The coals and bricks were expressly ordered by the owners, and were mentioned [*220] in the invoice and bill of lading as cargo shipped there. She sailed from *Liverpool* on the 1st of *July*, and arrived on the 2nd of *August* at *Barbadoes*. The whole cargo, with the exception of the coals and bricks, was discharged at *Barbadoes*, and three hundred and thirty empty casks were taken on board by the same boats which took the cargo on shore. The vessel was about to sail from *Barbadoes* to *Berbice*, for the purpose of procuring a cargo, on the 11th of *August*, but was lost in a hurricane on the night of the 10th. On the 31st of *July*, two days before the ship's arrival at *Barbadoes*, the plaintiffs write to their correspondent at *Berbice* a letter, containing this passage:—"We have determined on sending over the *Decagon*, with as many rum puncheons as she can carry, besides the coals and bricks that she is ballasted with; and we request that you will engage as much molasses as will load her—say three hundred and thirty puncheons." It was also proved, that some ballast was necessary for her voyage from *Barbadoes* to *Berbice*. It was contended for the defendants, that the adventure was determined at *Barbadoes*, the ship having discharged all but the coals and bricks. The Lord C. J. *Denman* directed the jury to find for the defendant, if they thought that the cargo had been substantially discharged at *Barbadoes*. The jury found for the defendant.

Littledale, J.—"I should probably have arrived at a conclusion different from that of the jury; for the proportion of the bricks and coals to the rest of the cargo does appear to me very large for articles which were to serve as mere ballast, and there is no doubt of their having been originally taken out as merchandise. That, however, was entirely a question for the jury, who were to determine what was substantially the port of discharge. I cannot say that they have determined improperly. Then the only question for us is the construction of the policy. Now the first expression used in it relative to the duration of the adventure is, 'port or ports of *discharge, and loading in the United Kingdom;' the words 'final port' do not [*221] occur till a later part of the instrument, and they must be interpreted by aid of the earlier words. I am of opinion, therefore, that the risk was meant to end as soon as the substantial purpose of the voyage, that is, the delivery of the cargo was completed; and I cannot agree that it was to continue while the empty ship was on a seeking voyage for a fresh cargo."

Parke, J.—"I am entirely of the same opinion. It is contended that the adventure continued, not only till the cargo was discharged, but during all the time the vessel should be seeking a fresh cargo. But it seems to me impossible to put so wide a construction on the policy. 'Final port' must mean the port which is final with a reference to the goods taken on board in the *United Kingdom*. The case is not distinguishable from *Inglis* v. *Vaux*. (*a*) Then as to the question of the discharge of the cargo, that was entirely for the jury."

Patteson, J., and Lord *Denman*, C. J., concurred.

(*b*) 1 A. & E. 25.

(*a*) 3 Camp. 437.

In *Mellish* v. *Andrews*, (*b*) which was an action on a policy of insurance on goods "at and from *London* to the ship's discharging port or ports in the *Baltic*, with liberty to touch at any port or ports, for orders or other purposes, and to touch and stay at any ports or places whatsoever and wheresoever:" it was held by Lord *Ellenborough* and the rest of the Court that the ship having touched at *Carlshamn* in *Sweden* for orders, and having gone on to *Swinemunde*, a more distant port, for further orders, and having received orders at *Swinemunde*, because it was unsafe to land there to return to *Carlshamn*, and await for orders, might so return to *Carlshamn* without being guilty of a deviation, it being shewn that she went to *Swinemunde* for orders, in the prosecution of her voyage, and returned to *Carlshamn* to obtain orders in the further prosecution of it.

And a similar construction was lately put upon a policy in the Court of King's Bench, in the case of *Hunter* v. *Leathley*. (*a*) The policy [*222] *was effected, "at and from *Singapore*, *Penang*, *Malacca*, and *Batavia*, all or any, to the ship's port or ports of discharge in *Europe*, with leave to touch, stay, and trade at all or any port or places whatsoever and wheresoever, in the *East Indies*, *Persia*, or elsewhere, upon goods on board certain vessels beginning the adventure from the loading thereof on board the said ships as above." And "it should be lawful for the said ships, &c., in that voyage, to proceed and sail to, and touch and stay at any ports or places, whatsoever and wheresoever, in any direction, and for any purpose necessary or otherwise, particularly *Singapore*, *Penang*, *Malacca*, *Batavia*, the *Cape of Good Hope*, and *St. Helena*, with leave to take on board, discharge, reload, or exchange goods and passengers, without being deemed any deviation from, and without prejudice to that insurance." The ship took in part of her cargo at *Batavia*, then went to *Sourabaya*, another port in the *East Indies*, (not in the course of the voyage from *Batavia* to *Europe*, and not specified by name in the policy) and took in other goods, and then returned to *Batavia*, whence she afterwards sailed for *Europe*, and was lost by perils of the sea. The case was tried before Lord *Tenterden* at *Guildhall*, and a special verdict was found by the jury. The judgment of the Court, after taking time to consider, was delivered by Lord *Tenterden*, C. J.—"It is obvious, on the perusal of this policy, in which so many places of departure, and four ships are mentioned, with liberty to declare and specify the particular ship and goods afterwards, that at the time of the insurance, the assured must have been ignorant of the particular port in the *East Indies*, at which goods for him would be shipped, as well as of the name of the ship, as of the species of goods; and must therefore have intended to have protected himself against loss, whatever might be the sort of goods, by whichsoever of the four ships they should be sent, and at [*223] whatsoever place or places in the *East* they *might be put on board; and the defendants subscribing such a policy must be understood to have intended to afford a protection equally extensive, if the terms of the policy will admit of such an effect being given to the instrument." His Lordship, after referring to the rule of construction of marine policies laid down by Lord *Ellenborough* in *Robertson* v. *French* (*b*) proceeded thus:

"Such being the object of the assured and the rule of construction, we are to look at the policy in order to gather from thence whether or no the whole or any part of the plaintiff's interest can, consistently with such decisions as have taken place on similar subjects, be considered as protected. The plaintiff contends that his whole interest, as well in the goods shipped at *Sourabaya*, as in

(*b*) 2 M. & S. 26.
(*b*) See *ante*, p. 183.
(*a*) 10 B. & C. 858.

the goods shipped at *Batavia*, is protected. The defendant insists that no part is protected; or, supposing the goods shipped at *Batavia* to be protected, that the shipment at *Sourabaya* is not. The grounds upon which it was contended that no part was protected were, first, that the policy did not attach, the goods shipped at *Batavia* being, as it was urged, shipped, not for a voyage to *Antwerp*, but for a voyage to *Sourabaya* and back to *Batavia;* from whence a distinct voyage to *Antwerp* commenced. Secondly, supposing the policy to have attached on those goods while the ship remained at *Batavia*, yet the voyage to *Sourabaya* was a deviation. The ground on which it was contended that the goods shipped at *Sourabaya* were not protected was, that *Sourabaya* could not be considered as a port of loading, or *terminus a quo* within the meaning of this policy. We are of opinion, however, that goods shipped at *Batavia* were in reality shipped for a voyage to *Antwerp* by way of *Sourabaya*, and that the ship's first departure from *Batavia* was on such a voyage. And considering the very extensive powers given by this policy both in the first and last clauses, we think the sailing to *Sourabaya* was not a deviation; it could not be so *deemed without a direct contradiction to the terms of the policy, it being clear that the ship sailed to *Sourabaya* for the purpose and in the prosecution of the original adventure contemplated by the policy. And upon these points the principle of the decision in *Mellish* v. *Andrews*, (*a*) is applicable to the present policy; the only difference between the two cases being, that in *Mellish* v. *Andrews* the places of discharge or termination of the voyage, and the course of sailing for that purpose, were left undefined, by reason of the uncertain state of commerce in the *Baltic*, and in the present case the places of shipment or commencement of the voyage, and the course of sailing for that purpose, are left undefined, by reason of the ignorance of the assured as to those particulars. The order in which the four places named stand in the policy, shews plainly that a voyage in the direct geographical or nautical course was not thought of, it being clear that it was thought possible that goods might be laden at each of those places. [*224]

With regard to the goods shipped at *Sourabaya*, the question is, whether that place can be considered as a loading port or *terminus a quo* within the meaning of the policy. *Sourabaya* is certainly a place in the *East Indies*, and so within the meaning of the words used in that part of the policy wherein the voyage is described. But it is said, that the words "ports and places in the *East Indies*, *Persia*, or elsewhere," not following directly after the four places first named, as the *termini a quibus*, but after the places named as the *termini ad quos*, and being introduced by the words 'with leave,' &c., cannot be understood to designate places of shipment of the plaintiff's goods, but only places to which the ships might be permitted to sail for some other purpose. On the other hand, it was contended that those words might, according to two decided cases, which I shall presently mention, be considered as places of shipment, and that in this particular policy they must be so considered, because the *places to which the ships might sail without deviation or prejudice to the insurance, are afterwards mentioned and provided for by the policy in a distinct clause, of which the language is more loose and comprehensive than the language of the first clause. Now, if we suppose that a shipment of goods by the plaintiff in some place that might be imagined, as, for instance, on the coast of *Brazil*, would not be a shipment within the first clause, and so not be protected by the policy; but that, nevertheless, if the ship, after receiving the plaintiff's goods, had sailed for that coast for some other lawful purpose, the benefit of the policy would have been saved by virtue [*225]

(*a*) 2 M. & S. 27, *ante*, p. 221.

of the latter clause; the two clauses will each have a distinct and appropriate sense. And without determining what effect the latter clause might have on a question as to the places of shipment of the plaintiff's goods, we are clearly of opinion that the words 'ports and places,' &c. in the first clause may and ought to be understood as such places. And the two cases of *Violett* v. *Allnutt*, (*a*) and *Barclay* v. *Sterling*, (*b*) are plain authorities to shew that a place mentioned after the words 'with liberty to touch,' &c., may be considered as a loading port. For these reasons, and upon these authorities, we think the plaintiff entitled to recover in respect of all his goods." (*c*)

But where, in *Lavabre* v. *Wilson*, and *Lavabre* v. *Walter*, (*d*) an action upon a policy, the voyage insured was described in these words: "at and from *Port L'Orient* to *Pondicherry*, *Madras* and *China*, and at and from thence back to the ship's port or ports of discharge in *France*, with liberty to touch, in the outward or homeward-bound voyage, at the isles of *France* and *Bourbon*, and at all or any other place or places what or wheresoever." In a subsequent part of the policy there was this clause, "and it shall be lawful for the [*226] said ship in this voyage to proceed and sail to, and touch and stay at *any ports and places whatsoever, as well on this side as on the other side of the *Cape of Good Hope*, without being deemed a deviation." The ship arrived at *Pondicherry*, and after remaining there one month, she sailed for *Bengal*, instead of going to *China;* having wintered at *Bengal*, and received considerable repairs, she returned to *Pondicherry;* and having taken in a homeward-bound cargo, proceeded in her voyage back to *L'Orient*, but was taken by the *Mentor* privateer. The question in that case, as far as it is material to us in this part of our work, was, whether the voyage to *Bengal* was insured within the construction of this policy? The reporter of this case says, it was insisted in the opening, for the plaintiffs, that, under the general liberty given by the policy, of touching at all places whatsoever, the vessel might go to *Bengal*, which, by the operation of those words, was as much part of the voyage as if it had been expressly named.—Lord *Mansfield*, however, having intimated a clear opinion, that the general words were, by the expressions of "in the outward or homeward-bound voyage," and "in this voyage," qualified and restrained so as to mean all places whatsoever in the usual course of the voyage "to and from the places mentioned in the policy," this ground was immediately abandoned, and never further mentioned by the counsel for the plaintiffs in the progress of these causes.

So in a case of *Richardson* v. *London Assurance Company*, (*a*) upon an *East India* captain's investment, to all or any of the ports or places, &c. until arrived at the last place of discharge on the outward cargo, Lord *Ellenborough* held that the outward voyage terminated, where all the company's outward cargo was discharged.

There has been a very recent case of *Phillipps* v. *Irving*, (*b*) which is an important case on this subject. The action was on a policy of insurance on [*227] the ship *Broxbourneburg*, "at and *from *London* to *Bombay*, and thence to *China*, and back to the *United Kingdom*, with liberty to touch, stay, and trade at all ports and places on this side, at, or beyond the *Cape of Good Hope*." The defendant pleaded first, (which was the only

---

(*a*) 3 Taunt. 419. (*b*) 5 M. & S. 6.

(*c*) This case was afterwards removed by error into the Exchequer Chamber, and the judgment of the Court above affirmed, 7 Bing. 517,

(*d*) 1 Doug. 284. (*a*) Camp. 94.

(*b*) 8 Scott, N. R. 3, *ante*, p. 177, where the case is briefly mentioned in conjunction with Mount v. Larkins, to which it is likened in this case, for the question respecting unreasonable delay.

plea on which any question was raised,) that the ship arrived at *Bombay*, remained there an unreasonable time, and that the assured did not duly prosecute the voyage insured, and, therefore, was guilty of a deviation. At the trial, the facts applicable to that plea were withdrawn from the consideration of the jury, and it was agreed that it should be reserved for the Court to determine upon the facts applicable to the first issue, whether or not there had been an unreasonable delay in the prosecution of the voyage as to discharge the underwriters. The jury having returned a verdict for the plaintiff. A motion, (pursuant to leave reserved) was made to enter a nonsuit or a verdict, on the first issue, for the defendant.

On the argument, it was contended that the delay at *Bombay* from the time of the completion of some repairs which had been considered necessary, until the 2nd *November*, at all events, was unreasonable, so far as concerned the underwriters, and clearly amounted to a deviation. [*Cresswell*, J.—"The captain had a right to stay at *Bombay* a reasonable time, with reference to his owner's interests."] But the reasonableness of the time must be estimated by the ordinary state of trade: the underwriters do not, by their contract, hold themselves responsible for delays resulting from lowness of freight. [*Tindal*, C. J.—"The question, as it strikes me, is, whether or not the master waited at *Bombay* longer than was reasonable, regard being had to the interests of his employers, and the duty he owed them: and if not, whether that was not one of the contingencies covered by the policy."] The owners might protect their interest by a time policy. [*Tindal*, C. J.—"The policy provides that the ship may touch, stay, and trade at all ports and places, &c. How long is the master to stay? The limit must clearly be with reference *to the [*228] advantage of the owners. A stay that would be reasonable with regard to the owners' interests, may surely be reasonable in the contemplation of the underwriters."] [*Cresswell*, J.—"What is the ordinary state of trade at *Bombay?*"] The delay was conceded to be extraordinary and out of the usual course, and unreasonable, unless justified by reason of the circumstances deposed to by the captain and the mate. [*Cresswell*, J.—"The question is one of considerable importance to shipowners and underwriters, and more especially as regards ships engaged in the *African* trade, where the exorbitant demands of the native princes frequently occasion many months' delay."] The Court took time to consider their opinion, which was now delivered by *Tindal*, C. J. After stating the case as in the commencement of this account of it, his Lordship proceeded: "The ship arrived on the 3rd *June*, 1842; some repairs were necessary, which were completed on the 2nd *September;* the ship was then ready to take in her cargo, but, in fact, none was put on board until 10th *January*, 1843. The ship was a seeking ship, commanded by one of the part-owners; and we think it was clearly proved that he could not at an earlier period have obtained a cargo, either for *China* or the *United Kingdom*, at a remunerating freight. Several circumstances combined to render freights unusually low at *Bombay* during the time the ship in question remained there. Ships that had taken out troops were in want of homeward cargoes, and the disturbance with the trade with *China* had prevented many ships from sailing thither from *Bombay*. The latter port was therefore crowded with shipping, and the freights offered would, if accepted, have occasioned a great loss to the owners; and there was nothing to shew that, as far as the interests of the owners were concerned, the delay at *Bombay* was improper. But it was contended, that although the adventure on which the ship sailed might have been prosecuted without any improper delay, as far as the owners were concerned, yet with regard to the underwriters, the case was *different, and [*229] the delay unreasonable and improper, and therefore equivalent to a deviation; and that, as the concurrence of circumstances which rendered freights

at *Bombay* ruinously low was unusual, it could not be said that the voyage was prosecuted in the usual course. It was not, nor could it be denied that the ship might be detained some time in order to obtain a cargo at a reasonable rate of freight; but it was said that such detention could not, without discharging the underwriters, be extended beyond the time usually required for such purpose. It appears to us, however, that no such rule can be laid down; that detention for a reasonable time, for the purpose of the adventure insured, must be allowed: and that whether the time is reasonable or not, must be determined, not by any positive and arbitrary rule, but by the state of things existing at the time at the port where the ship happens to be. It may be collected from numerous cases, (*a*) that delay before or after the commencement of a voyage is not equivalent to a deviation, unless it be unreasonable. And we think that no certain or fixed time can be said to be reasonable or unreasonable for seeking a cargo in a foreign port, but that the time allowed must vary with the varying circumstances which may render it more or less difficult to obtain such a cargo." Rule refused.

DEVIATION FROM THE VOYAGE INSURED.

The circumstances relating to the permission granted to the assured by the terms of the policy, that in performing the voyage insured, he shall go to and touch at, and stay at those places on the voyage in question, which are usual for ships trading to the particular part of the world, and in the habit of so doing, "without any prejudice to the insurance," have been mentioned.

[*230] These observations, it will be recollected, apply more particularly *to the ships which are insured on voyages to the *East Indies*, and round the *Capes*, to *China*, and different distant parts of the globe: we have seen that such ships are usually insured with very extensive liberties both in port and at sea, backwards and forwards, and on all kinds of services, &c., and we saw that formerly it was the practice of the *East India Company*, frequently to employ the ships which had sailed from *Europe* in any trade, or for any purpose of their own, without any regard to the interests of the owners; in consequence of this practice, it was necessary, in order to protect the interests of the shipowners and freighters, that these extensive and comprehensive liberties should be inserted in policies on those voyages; and all those risks attending such voyages were well known to the underwriters, and they protected themselves accordingly by the amount of the premiums: but we also recollect, that it has been laid down by many decisions, that the Courts of law have always construed the particular clause in the policy making it lawful for the ship to "touch, stay, trade," &c. strictly, and that it is held that this liberty is always to be confined to some legitimate purpose connected with the voyage insured; and it is expected that a ship insured for any particular voyage, does at once proceed to take, and keep (if it is possible) the proper route and course, which according to seafaring persons, is acknowledged by all such to be the best and the proper one to perform the voyage insured.

But if, instead of keeping the proper course, the ship either by the direction of the assured, or his agent, or by the wilful act of the master, without necessity, or any reasonable cause, alter her course in a different direction, for any purpose not connected with the original voyage insured, this amounts in the law of marine insurances of this country, to what is termed a "deviation" from the voyage. But this is not all; for if a ship is at a particular port, and is repre-

(*a*) Hartley v. Buggin, Park Ins. 652. Mount v. Larkins, 1 M. & Scott, 165; 8 Bing. 109. Ougier v. Jennings, 1 Camp. 505, (n).

sented to the underwriters as being bound at such a time on a certain voyage, upon which an insurance is made by the party interested, with the underwriters, and the ship leaves her *port and starts ever so little a way on her voyage, or if she is insured in port and is lost before she sails, if [*231] by sufficient proof it can be made apparent, that by the particular equipment of the ship—the coals, stores, and provisions, calculated for a different voyage from the one represented to the underwriters, or from evidence either of witnesses, or by letters on the subject, from that moment the insurance is void; for it is manifest that the master, either by direction of his owners, or by a wilful act of his own, had prepared himself before he set sail, to go on a voyage different from the one insured, and the moment he left the port (*a*) is lost, or in case of the insurance being on the ship in port, if she is lost in port, the insurance is, from the fact of the preparation of the master to go upon a voyage other than the voyage insured, void. (*b*)

I. The term deviation in marine insurances is understood to mean, a voluntary departure, without necessity, or any reasonable cause, from the regular and usual course of the specific voyage insured. (*c*)

There are a great many cases in the books, varying in their particular circumstances, but which have been held by the Judges to amount to such a departure from the original voyage as to discharge the underwriters. I shall endeavour to divide the subject into the different classes of the cases which have been held deviations from the voyage insured.

But I shall previously mention an important case. The case I mean is that of *Vallejo* v. *Wheeler*, (*d*) tried before Mr. J. *Ashurst*, at *Guildhall*, at the sittings after Easter Term, 1774, and after brought upon motion for a new trial, when Lord Chief Justice *Mansfield* and the rest of the Judges delivered their judgments: I shall only here remark that it was admitted in the case that the master had been guilty of a deviation by carrying the ship out of her course *to *Guernsey* on a smuggling speculation of his own, but as this [*232] was held to be a fraudulent act of the master against the owner, '*pro hac vice*,' the underwriters were liable upon the question of "barratry of the master," against which the freighters were protected by the express terms of the policy; and the Court held that it did not lie in the mouth of the underwriter to object on the ground of its being a deviation, and so to prevent the plaintiff's recovering on that count: because the act of the master is a fraudulent act, and if the loss is consequential upon such fraudulent act, it is 'barratry,' against which the party is insured: and therefore the insurers shall not object upon a fact which is itself a forfeiture of the policy."

I shall proceed to mention an important decision which is applicable to what I have above remarked, of the alteration of a voyage from the one originally insured. The case I allude to is *Tasker* v. *Cunningham and others*. (*a*) This was an appeal from the Court of Session in *Scotland* to the House of Lords. It came on for argument in the year 1819. And judgment was delivered by the Lord Chancellor (*Eldon*) on the 7th of *July* of that year. The circumstances of the case are these.

The respondents, who were engaged in the *Newfoundland* trade, expecting one of their vessels called the *Henrietta*, to arrive with a cargo of fish at *Cadiz*, in the beginning of the year 1810, directed Messrs. *Lynch & Co.*, their agents at that place, as soon as the cargo should be discharged to ballast the vessel with

(*a*) Graham v. Barras, 5 B. & Ad. 1011.
(*b*) See Woolridge v. Boydell, Doug. 16. Way v. Modigliani, 2 T. R. 30.
(*c*) Park Ins. 619.
(*d*) Cowp. 143. This case is fully reported, *post*.
(*a*) 1 Bligh, Rep. 87.

salt, and to endeavour to procure freight for her to *Clyde*. The vessel arrived at *Cadiz* about the time expected, but the *French* army having taken possession of the salt-pans in that neighbourhood, it was not in the power of *Lynch & Co.* to comply with the respondents' instructions. Under these circumstances they resolved, with the approbation of the ship-master, to despatch the
[*233] vessel for *Liverpool*, in the place of *Clyde*. Of this change of the *destination of the vessel, Messrs. *Lynch & Co.* advised the respondents by a letter dated 16th *January*, 1810. By a letter dated 10th *February*, from the same persons to the respondents, the cause of this variation is assigned in the following terms: "I have at last sold the *Elizabeth's* cargo at 3½ per quintal, &c. As to the *Henrietta's* I could not get a purchaser for the whole, so began to retail it at five dollars, at which I hope to send the whole off shortly. As the *French* have got possession of all the salt-pans in the neighbourhood, I cannot ship any salt in these vessels, so that we will set them up for *Liverpool* (where salt can be got) with a prospect of getting full freight without much delay." It was necessary that a cargo of salt should be sent out early in the spring, for the supply of the fishery, and salt could only be procured at *Liverpool*. Messrs. *Lynch's* letters, with their intentions, were written while the fish was yet on board. After the receipt of it, and upon the 12th of *March*, the respondents made an insurance upon the voyage at and from *Cadiz* to her port of discharge in *St. George's Channel*, including *Clyde*, which was underwritten by the appellant to the extent of 100*l*.

Circumstances afterwards occurred which induced Messrs. *Lynch* and the ship-master again to alter the destination of the vessel. The sale of the cargo and delivery had been protracted so long as to give reason to apprehend that if the vessel proceeded to *Liverpool* to load salt, the supply of that article would not reach *Newfoundland* at the proper season, in the Spring, and in the meantime the French had retired from the salt-pans at *Cadiz*, so that a cargo of salt could readily be obtained there.

Messrs. *Lynch & Co.*, therefore, after consulting with the master of the *Henrietta*, and with the master of another vessel belonging to the respondents, deemed it for the interest of the respondents to despatch the *Henrietta* direct to *Newfoundland;* and as it was necessary to give the respondents immediate information of this change in the destination of the vessel, to the end that they
[*234] might insure the new voyage; they *wrote on the 28th *February*, 1810, to the respondents in the following terms:—"In consequence of the unprecedented want of small craft, and the general confusion that has prevailed since the French appeared in this neighbourhood, the delivery of the *Elizabeth's* cargo has been delayed; and as it is likely the *Henrietta* will be detained from the causes, Captain *Collins* has, after consulting with Captain *Fields*, determined to return direct to *St. John's* with a cargo of salt, now to be had at double price." Eight days after the date of this letter, while the vessel was lying at *Cadiz*, she was driven on shore by a storm, and burnt by the *French*. The letter of the 28th *February*, and another letter conveying the intelligence of the loss were received by the respondents on the same day, viz: upon the 21st of *April*, 1810. In these circumstances the respondents did not communicate to the appellant or the other underwriters the letter which they had received from *Lynch & Co.* respecting the projected alteration of the voyage, and obtained payment from them for a total loss. The House of Lords, reversing the judgment of the Court below, decided that the correspondents at *Cadiz* were agents of the respondents; that the voyage insured was abandoned by their determination to send the ship on a different voyage, and therefore the underwriters were not liable for the loss. The consequence of which decision being that the owners were bound to refund the money, with interest, which had been paid by them before they were apprised of the facts.

The Lord Chancellor, in giving his judgment ends in these words:—"It is contended that there was nothing to alter the voyage but the intention, which might have been again varied, and as there was no progress made in unloading the cargo, nor any act done towards a change of the voyage; this is to be considered as a loss under the policy. Undoubtedly a mere meditated change does not affect the policy. But circumstances are to be taken as evidence of a determination, and what better evidence can we have than that those who were authorized had determined to change the voyage. In my opinion the *voyage was abandoned, and I have the highest authority in [*235] *Westminster Hall* to confirm that opinion. Suppose they had gone upon the second voyage, and the ship had been lost after insurance for that voyage, on which of the policies could they have claimed or recovered? Certainly not on the first. Upon the letters of the agents and the captain it must clearly be considered an abandonment." The Lords found that the voyage ought to be considered as having been abandoned before the loss of the vessel, and the interlocutors were reversed. (*a*)

I now proceed to state some of the most material cases of the several and distinct descriptions, which, from early times, have been held to be deviations by the Courts of Law.

1. In a case of *Fox* v. *Black*, (*b*) the plaintiff was a shipper of goods in a vessel bound from *Dartmouth* to *Liverpool;* the ship sailed from *Dartmouth* and put into *Loo*, a place she must of necessity pass by in the course of the insured voyage. But she had no liberty given her by the policy to go into *Loo;* and although no accident befell her going into or coming out of *Loo*, (for she was lost after she had got out to sea again) yet Mr. J. *Yates* held that this was a deviation; and a verdict was accordingly found for the underwriter.

In another early case before Lord *Mansfield*, of *Townson* v. *Guyon*, (*c*) an action was brought on a policy "on goods and other merchandises," loaded on board the ship called the *Charming Nancy*, from "*Dunkirk* to *Leghorn*." The ship came to *Dover*, in her way, to procure a *Mediterranean* pass, and was afterwards lost. Lord *Mansfield* was of opinion that the calling at *Dover* was a deviation, and the plaintiff was nonsuited.

2. Mr. J. *Park* says, (*d*) it was held by Lord Chief Justice *Lee*, that if the master put into a port not usual, or stay an unusual time, it is a deviation which discharges the underwriter. But, in the case of *Smith* v. *Surridge*, (*e*) it was held that the *time which a ship is detained in the port for necessary repairs, the insurance being "at and from," shall not [*236] be taken to be unnecessary delay, so as to avoid the policy. Lord *Kenyon* said, that the policy attached on the ship while she was undergoing repairs; it was, in such a case, not necessary that she should be fit to proceed on the voyage at the time of the insurance. The underwriter took into his consideration the time she might necessarily be detained.

And see what C. J. *Tindal* said, in the case of *Mount* v. *Larkins*, (*a*) referred to in a previous part of this Treatise; and see also the recent case, which I have already mentioned, of *Phillipps* v. *Irving;* (*b*) and see the case of *Ougier* v. *Jennings*, (*c*) which has likewise been referred to in this Treatise.

(*a*) See the case of Driscoll v. Bovill, 1 B. & P. 313.
(*b*) Exeter Ass. 1767, before Mr. J. Yates, Park Ins. 620.
(*c*) Park Ins. 620.
(*d*) Ibid.
(*e*) 4 Esp. 25. *Ante*, p. 176.
(*a*) 8 Bing. 122. *Ante*, p. 107.
(*b*) 8 Scott's N. R. 3. *Ante*, p. 226.
(*c*) Sit. in C. P. 1800. 1 Camp. 505, note (*a*), and *ante*, p. 205.

Mr. J. *Park* mentions two cases of *Stitt* v. *Wardell* (*d*) and *Sheriff* v. *Potts*, (*e*) which cases were declared by Lord *Ellenborough* to have been overruled in a case I am about to mention.

It was the case of *Raine* v. *Bell*, (*f*) which was an insurance at and from the ship's loading ports, on the coast of *Spain* to *London*, with liberty to touch and stay at any port or place whatsoever; the jury found expressly that the going into and staying at *Gibraltar* was of necessity, in order to procure a supply of provisions, and that the stay was not longer than the necessity required; and it was proved that while the vessel lay there, the captain received on board some chests of dollars. This fact, and this finding of the jury, raises the question of law, whether the taking in the additional cargo of dollars was a breaking of bulk in the course of the voyage, at a place where there was no liberty to trade given by the policy, so as to avoid it, as increasing or having a tendency to increase the risk. The point was very fully argued; and the counsel, who argued that this amounted to a deviation, relied on the two cases last quoted.

[*237] But the Court were unanimous in deciding that, as the *jury had found that the whole period of the ship's stay was covered by the necessity which originally induced her to go into *Gibraltar*, there was no implied warranty in such a policy that the ship shall not trade, so as no delay be actually occasioned. And as to the temptation to deviate held out to the master, that must always be a question for the jury, as in other cases of fraud, whether the deviation or delay arose from the trading or from necessity; and an intention to deviate, not carried into effect, will not avoid a policy, still less can a temptation to deviate avoid it.

The above case was afterwards twice fully considered. First, in the case of *Cormack* v. *Gladstone*, (*a*) where it was held that the vessel, being obliged to stop to pay the *Sound* dues, at *Elsineur*, taking in some provender for sheep, but not thereby delaying the voyage, was no avoidance of the policy. Secondly, in the case of *Laroche* v. *Oswin*, (*b*) where taking in a few goods in a roadstead, where the ship way lying for convoy, and after the signal for sailing but before the signal to weigh, was held not to be a deviation, the jury having expressly found that taking in the goods occasioned no delay.

The next case to be mentioned is, the case of *Elliott and others* v. *Wilson & Co.*, (*c*) which underwent a variety of discussion in the several Courts in *Scotland*; and in all of them judgment was given against the underwriters; but upon an appeal to the House of Lords, the various decrees of the Courts below were reversed, agreeably to those principles adduced in the beginning of this inquiry, and which have been uniformly admitted as sound law.

The harbour of *Carron*, situated near the head of the *Frith of Forth*, is chiefly resorted to by ships in the service of the *Carron* Company, who have a great iron work and considerable collieries in the neighbourhood. From thence vessels, intended principally to convey the manufactures of the company,

[*238] their coals, and such goods as may be offered them on *freight, sail periodically for *Hull* and other places on the eastern coast of *England*. This is a coasting or carrying trade—the vessels, in going down

---

(*d*) Sit at Guildhall, Mich. 1797, Park Ins. 621.

(*e*) Sit. after M. T. 1803.

(*f*) 9 East, 195. See also Urquhart v. Barnard, 1 Taunt. 450.

(*a*) 11 East, 347.

(*b*) 12 East, 131. See also Violett v. Allnutt, 3 Taunt. 419, *ante*, p. 218; Barclay v. Stirling, 5 M. & S. *ante*, p. 218; and Hunter v. Leathley, 10 B. & C. 858, *ante*, p. 221.

(*c*) 7 Bro. Parl. Cas. 459.

the *Frith*, touching at different places to take in additional loading, or to discharge part of what they have received at places higher in the river. Particularly it is usual for these vessels to call at *Borrowstowness*, and *Leith*, and at *Morrison's Haven*, a port six miles farther down the *Frith*, and on the same side with *Leith*, in the bay of *Prestonpans*. In *February*, 1774, the respondents had occasion to ship fourteen hogsheads of tobacco on board one of these vessels for *Hull:* and, desiring to insure them, gave the following instructions in writing to Hamilton and Bogle, insurance-brokers in *Glasgow*—"Please to insure for our account by the *Kingston*, George Finlay, master, from *Carron* to *Hull*, with liberty to call as usual, fourteen hogsheads of tobacco;" and these instructions were entered in the broker's books, for the perusal of the underwriters, as is the practice at *Glasgow*. Upon the 9th of *February*, the appellants underwrote a policy of insurance, in these terms:—"Beginning the adventure of the said tobacco at and from the loading thereof on board the said ship *Kingston*, at *Carron* wharf, and to continue and endure until said *Kingston* (being allowed a liberty to call at *Leith*) shall arrive at *Hull*, and there be safely delivered." The respondents were not privy to the allowance to call at *Leith* being thus substituted in the policy for the more general term *as usual*, mentioned in the instructions to the broker. The premium agreed on was 1*l.* 5*s.* per cent.—a rate equal, at least, if not higher, than was usual to be given in the voyage, in cases where it was understood or expressed in the policy, that the vessel might touch at the customary ports. And, in particular, some of these appellants, in *February*, 1772, underwrote a policy upon this very vessel, and for the same voyage, with liberty to call at *Leith* and *Morrison's Haven*, at a premium of one per cent. only. The vessel thus insured had sailed from *Carron* five days before the date of the policy, that is, on the 4th of *February*, 1774; it did not call or touch at *Leith*, but put into [*239] *Morrison's Haven:* set sail from thence, on the 9th, got safe into the direct course from *Carron* to *Hull*, cleared the *Frith of Forth*, and proceeded with a fair wind, till on the evening of the 10th, the vessel, being overtaken by a storm at *Holy Island*, on the coast of *Northumberland*, was wrecked, and the cargo totally lost. All these were facts admitted; nor was it alleged by the appellants that the ship received the smallest damage in going into or coming out of *Morrison's Haven*. Intelligence of this misfortune reached *Glasgow*, on the 14th of *February*, when the respondents for the first time saw the policy of insurance, or understood that it differed in terms from their instructions to the broker, in whose hands it remained.

Upon the 24th of *February*, the appellants, in an instrument drawn by a public notary, protested against the ship's having gone into *Morrison's Haven*, as a deviation from the terms of the policy, which only contained a liberty to call at *Leith;* and absolutely refused payment of the loss. On this refusal, the respondents brought their action against the appellants in the Court of Admiralty, in *Scotland*, and after various proceedings in the Courts there, the underwriters were decreed to pay the loss.

But upon an appeal to the House of Lords that judgment was reversed; and the House of Lords were of opinion, that a wilful deviation from the due course of the insured voyage, is in all cases a determination of the policy; that from that moment, the engagement between the insurers and insured is at an end; that it is immaterial from what cause, or what place, a subsequent loss arises, the insurers being in no case answerable for it: that going into *Morrison's Haven* was a wilful deviation from the due course of a voyage from *Carron* to *Hull:* that though it may be true, as contended on the part of the respondents, that ships sailing through the *Frith of Forth* have sometimes been permitted by the terms of a policy, underwritten at the same premium as the present, to go into that port, it could not avail in the present case, since the

[*240] policy in question had given no such permission. It was *therefore ordered and adjudged that the interlocutors complained of should be reversed.

So where several places are mentioned in a policy the assured must go to them in the order in which they are named, unless some usage to the contrary is proved.

In the case of *Beatson* v. *Haworth*, (*a*) upon a policy of insurance on a ship, "at and from *Fisherow* to *Gottenburg*, and back to *Leith* and *Cockenzie*," it appeared that in the homeward voyage she went first to *Cockenzie*, which lay nearer to *Gottenburg* than *Leith*, and was stranded in the harbour of *Cockenzie*. There was a good deal of evidence given to shew that *Leith* harbour was the safer of the two; but the jury seemed to be of opinion, according to a note taken by Lord *Kenyon* at the time, that the construction of the policy was to be made by attending to the order in which the places were named in it. The jury, however, by consent of parties, to save the expense of going to trial again, found a verdict for the plaintiff, with permission to enter a verdict for the defendant, if the court should agree that the above construction was the true one. The case came on to be discussed in Court; and they were of opinion, that unless there be some usage proved, or some special facts to vary the general rule, the party insured must go to the several places mentioned in the policy, in the order in which they are named; and that to depart from that course is a deviation; and one of the Judges added, that the parties by inserting the names contrary to the natural order of the places, shewed it to have been the intention of the parties to vary the natural course of the voyage. A verdict was entered for the defendant.

In the argument of this case, another case *Classon* v. *Simmard*, (*b*) was quoted by one of the learned Judges, as having been decided before Lord Chief Justice *Lee*, where in an insurance on the *Gothic Lyon* at and from *London* [*241] to her ports of discharge in the *Streights* as high as *Messina*, *his Lordship was of opinion, as she did not stop at *Marseilles* (for which place she had a cargo) in her way to the *Streights*, but meant to take it in her return, that this was acting contrary to the terms of the policy: for by her ports of discharge must be understood such ports as it was intended goods should be delivered at, and the first of these was *Marseilles*.

So in the case of *Hogg* v. *Horner*, (*a*) where a ship was insured "at and from *Lisbon* to a port in *England*, with liberty to call at any one port in *Portugal* for any purpose whatever:" and where the ship had sailed from *Lisbon* to *Faro* to complete her loading, *Faro* being a port to the southward of *Lisbon;* consequently lying directly out of the course of the voyage to *England;* Lord *Kenyon* was of opinion that the liberty, given by this policy, must be restrained to a permission to call at some port to the northward of *Lisbon*, in the course of the voyage to *England;* and that by going to the southward the assured had been guilty of a deviation.

So in *Gairdner* v. *Senhouse*, (*b*) after the voyage was described, a leave was given to call at all or any of the *West India* Islands, *Domingo*, and *Jamaica* excepted, the assured must take the ports in the succession in which they occur in the voyage. And in *Ranken* v. *Reeve*, (*c*) on a voyage at and from *Africa* to the *Canaries*, *Madeira*, and *Lisbon*, with liberty to touch, stay, and trade at all ports, &c., in the voyage, it was held that after she had moored at anchor twenty-four hours in a port in *Africa*, she could not proceed

(*a*) 6 T. R. 521.
(*a*) Sit. at Guild. after Mich. T. 1797.
(*b*) 3 Taunt. 16.
(*b*) At Guild. Hil. Sit. 1741. Park Ins. 627.
(*c*) Hil. 54 Geo. 3, B. R. Park Ins. 627.

to the southward, but northwards towards *Europe*, the object being only to protect deviations in the course of the voyage insured.

These cases seem clearly to have decided that where several termini are mentioned in a policy of insurance, as the objects of the assured, those ports must be gone to in the *order in which they are mentioned in the policy, otherwise the assured will be guilty of a deviation. [*242]

But in the case of *Lambert* v. *Liddard*, (*a*) on a policy at and from *Pernambuco*, or any other port or ports in the *Brazils*, to *London*, beginning the adventure from the loading goods on board the ship, on the termination of her cruise, and preparing for her voyage to *London:* the ship having finished her cruise, came to *Pernambuco*, and endeavoured to procure a cargo, and failed in doing so. She then proceeded for *St. Salvador*, in the *Brazils*, but out of the course to *London*, and was lost on her way thither. The Court held, that the policy attached at *Pernambuco*, this being the beginning of her trading voyage, and endeavouring to procure a cargo: that the going to *St. Salvador* was no deviation, the policy running in these words, "or any other port or ports," and therein differing from *Hogg* v. *Horner:* and that the voyage was well described in the declaration as from *Pernambuco*.

In an action of *Marsden* v. *Reid*, (*b*) on a policy on goods on board the *Franklyn*, at and from *Liverpool* to *Palermo*, *Messina*, *Naples* and *Leghorn;* the ship took in goods and was cleared out from *Naples* only, and had no goods on board for any other place, *Leghorn* being known to be in the hands of the *French* soon after the policy was effected. The ship was captured in the *Bay of Biscay* by the *French*, and consequently before the dividing point to any of the places mentioned in the policy. The plaintiff recovered a verdict. A new trial was moved for on two grounds, one of which only is material here, namely, that there was no inception of the voyage insured, which was to *Palermo*, *Messina*, and *Naples*, in the order in which they stand in the policy, as in *Beatson* v. *Haworth*, (*c*) whereas, here it appeared that the vessel never intended to go to *Palermo* or *Messina*, but only *to *Naples*, for which place she took in her loading and cleared out. [*243]

Lord *Ellenborough* said—"This is not a question of deviation; to raise which, it must be assumed that the voyage insured was commenced, and that the ship afterwards went out of her track, on that voyage; but there is no question of that sort here; the loss happened before the dividing point to any of the places named in the policy: the only question is, whether there were any inception of the voyage insured? and I am clear that there was. I think that the voyage insured to *Palermo*, *Messina* and *Naples*, meant a voyage to all or any of the places named: with this reserve only, that if the vessel went to more than one place, she must visit them in the order described in the policy. The assured must only not invert the order of the places, as they stand in the policy. And that was in truth all that was decided in the case of *Beatson* v. *Haworth;* where it must be remembered that the vessel had taken in goods for both the places named, *Leith* and *Cockenzie*, and it was assumed that she put into *Cockenzie*, first, in her way to *Leith*, where she was to discharge the rest of her cargo.

In the case of *Metcalf* v. *Parry*, (*a*) in an assurance "at and from *Antigua* to *London*, with liberty to call at all or any of the *West India* islands, *Jamaica* included," it was contended, that the calling must be in their natural order; and that as *St. Kitts* did not lie between *Antigua* and *London*, calling

(*a*) 1 Marsh. 149; 5 Taunt. 480; and see Bragg v. Anderson, 4 Taunt. 229.
(*b*) 3 East, 572. (*c*) *Ante*, p. 240.
(*a*) 4 Camp. 123.

there was a deviation. But Lord Chief Justice *Gibbs* was of opinion, that as the assured had leave to go to *Jamaica*, five hundred miles out of course, it was clear the parties intended that the assured might stop at any of them, though not in course. (*b*)

However short the time of deviation may be, if only for a single night, or even for an hour; the underwriter is eqnally discharged, as if there had been a deviation for weeks *or months; for the condition being once broken, no subsequent act can ever make it good. [*244]

In the case of *Cock* v. *Townson*, (*a*) the ship *George* was bound from *Cork* to *Jamaica* with a convoy in the course of a war: the captain, in consort with two other vessels, took advantage of the night, and being ships of force, cruised, and thereby deviated out of the direct course of their voyage, in hopes of meeting with a prize. Lord *Camden* clearly held, and a special jury of merchants, agreeably to his directions, determined, that from the moment the *George* deserted or deviated from the direct voyage to *Jamaica*, the policy was discharged.

In a case of *Jolly* v. *Walker*, (*b*) however, it seemed to be the general opinion of Lord *Mansfield*, and a special jury, and was sworn to be the usage, by several witnesses, that if a merchant ship carry letters of marque, she may chase an enemy, though she may not cruise, without being deemed guilty of a deviation.

This was an insurance on goods and the ship *Mary* from *London* to *Cork* and the *West Indies*, and the ship was warranted to proceed on that voyage with sixty men, and equipped with twenty-two guns, and eighteen and six pound shot, and sheathed with copper. The question was, whether a ship having letters of marque could chase an enemy's ship without being said to have deviated? The facts were that the ship sailed with letters of marque on board against the *French*, *Spaniard* and *Americans*, and was ordered not to cruise; but to proceed direct on her voyage to the *West Indies;* but in the event of her meeting or coming within sight of any ship belonging to the enemy, she was to chase, take, and make prize of such enemy's ship, if in her power. On the 26th of *December*, 1780, in latitude 14. 22 N. and longitude 40. 52 W. at midnight, a sail was discovered, whereupon the *Mary* gave chase, and on such vessel's perceiving the *Mary*, she hauled her wind to the northward, and *the *Mary* hauled up after her, and at one o'clock lost sight of her; but the *Mary* still stood to the northward, and at five A. M. saw such vessel again on the lee-bow two miles off. The chase was renewed, and at six A. M. the *Mary* came up within three-quarters of a mile of the vessel, when she hoisted *Spanish* colours, and at half-past seven the *Mary* came up within pistol shot and began to engage, which engagement continued till ten o'clock, when the *Spanish* vessel sheered off, leaving the *Mary* much disabled. She afterwards steered her course to the westward, and was taken on the 5th of *January* 1781, by an *American* privateer. It was agreed on all hands, that a ship in such circumstances might not cruise; and several witnesses spoke to the usage and practice of ships, which carried letters of marque, chasing an enemy. It was admitted, on the part of the insurers, that if an enemy came in the way, the ship must defend or engage: but contended, that if the letter of marque lost sight of the enemy, that was no longer chasing, but cruising. Lord *Mansfield* left it upon the evidence to the jury, who found for the plaintiffs. [*245]

(*b*) Mellish v. Andrews, 16 East, 312, and 2 Maule & S. 27, confirmed in the Exchequer Chamber, 5 Taunt. 496.

(*a*) Before Lord Camden, C. J. Park Ins. 630.

(*b*) At Guild. Easter Vac. 1781. Park Ins. 630.

And in the case of *Lawrence* v. *Sydebotham*, (*a*) a merchant-ship employed in commercial objects, was insured with or without letters of marque, with a liberty to chase, capture and man prizes, the captain is not justified, after he has captured a vessel, in the further prosecution of his voyage, in shortening sail and lying to, in order to let the prize keep up with him, for the purpose of protecting her, as a convoy, into port, in order to have her condemned, though such port be within the voyage insured; for that would be to extend the meaning beyond what the parties have themselves expressed, by giving them leave to convoy, as well as to chase, capture and man, which words alone extend the rights of the assured beyond the common terms of indemnity in the policy.

But in another case of *Parr* v. *Anderson*, (*b*) which was *also [*246] the case of an insurance on a commercial adventure, at and from *Liverpool* to *Africa*, &c., with or without letters of marque, it became a question, whether those words enabled the ship to chase for the purpose of hostile attack and capture, all vessels whensoever or wheresoever descried, provided the original pursuit commences from a point in the course of the voyage, without suspending or superseding wholly the objects, destination, and limits of the commercial adventure described in the policy: or whether they are to be confined to a leave to employ force for the purpose of defence, (including a liberty of attack and chase) only so far as they may fairly be supposed to promote ultimate security. The Court were of opinion, that the case of *Jolly* v. *Walker* did not afford any construction of a policy containing the liberty in question, inasmuch as that policy contained no such liberty. Therefore, in the absence of any determination on the effect of such words, the Court sent the case to a second trial, in order to ascertain, as a question of fact, in what manner the parties to such contracts have acted upon them in former instances, by paying losses, where deviations of the kind now in question have happened; and whether they have as yet obtained in use and practice, as between assured and assurers, any and what known and definite import.

The late Mr. J. *Park* here says, that "this case came on to be tried again before Lord *Ellenborough* and a special jury. (*c*) From my memory of what passed, having been one of the counsel in it, aided by a note which I have seen, his Lordship was strongly of opinion on the evidence, that this vessel had cruised, which of course, if the jury so thought, would put an end to the question. The jury found for the defendant; and I have no doubt upon that ground, from the evidence of the plaintiff's own witnesses."

Consistently with this principle, that the Court will not *extend [*247] the meaning of a license beyond what the parties have themselves expressed, and, therefore, in the case of *Jarrat* v. *Ward*, (*d*) where leave was granted by the policy to a merchant-ship engaged on a fishing voyage to cruise for, chase, capture, man, and see into port any ship or ships of enemies, Lord *Ellenborough* was of opinion that such a permission did not authorize the ship to remain in port till a prize receives necessary repair, which she could not have had otherwise: at most she might have entered the port with the prize, seen her safely moored, and perhaps have stopped a reasonable time to give directions for proceeding on the final destination. For if the captor were permitted to stay till the prize was repaired, the voyage might never terminate, for on leaving *St. Catharine's*, (the port to which this prize had been carried) another prize might have been taken, standing equally in want of repairs; afterwards a third, and so on in an infinite series. "This, therefore," said Lord *Ellenborough*, "turns out to be a risk, which the defendant did not underwrite."

(*a*) 6 East. 45.
(*b*) 6 East, 202.
(*c*) Guildhall, March 6, 1805. Park, 632.
(*d*) 1 Camp. 263.

And in the case of *Hibbert* v. *Halliday*, (*b*) it was held, "that liberty given in a policy on a fishing voyage, to chase, capture, and man prizes," does not authorize the ship to lie by nine days off a port, waiting for an enemy's ship to come out, when she should have completed her cargo, although such lying in wait was within the limits of the fishing ground.

In a case of *Moss* v. *Byrom*, (*c*) which came before the Court of King's Bench upon a motion for a new trial, the Judges were unanimously of opinion, that if the assured, without the knowledge of the underwriters, take out a letter of marque, (but without a certificate, which by the Prize Act of the 33 Geo. c. 66, s. 15, is absolutely necessary to its validity) for the purpose of inducing the seamen to enter, and without any intention of cruising, this does not so essentially vary the risk as to avoid the policy.

[*248] *The doctrine that a voluntary deviation from the voyage insured vitiates the policy, has been held to be applicable to an insurance upon freight as well as to an insurance upon ship and goods.

Thus in a case of *Murdock* v. *Potts*, (*a*) upon a policy of assurance on freight of the ship *Bethiah* at and from *Bordeaux* to *Virginia*, warranted *American* ship and property: the declaration alleged that the ship was an *American* ship and the property of *American* subjects. The plaintiff proved the ship to be *American*, and it was to have been contended upon the part of the defendant, that the warranty extended to the goods on board as well as to the ship: but upon the evidence it appeared that the goods, whether *American* or not, were to be carried in the ship from *Bordeaux* to *St. Domingo*, and that she was only to call at *Norfolk* in *Virginia* for orders; this rendered it unnecessary to discuss or decide the question upon the construction of the warranty, Lord *Kenyon* being of opinion, that the underwriters upon this policy had a right to expect that the goods, upon which the freight was payable, were consigned to *Virginia*, and that if the freight was payable for the carriage of them from *Bordeaux* to *St. Domingo*, the underwriters were not liable for the loss, though the ship was to call at *Norfolk* for orders, the freight payable being in such case different from the freight insured: plaintiff was nonsuited, and no application was made to set it aside.

In the case of *Taylor* v. *Wilson*, (*b*) however, it was held, that freight might be insured from *St. Ubes* to *Portsmouth* only, though her ultimate destination was *Gottenburg*, but meaning to stop at *Portsmouth* for convoy in her way.

It was said in the commencement of this subject, that a deviation meant a voluntary departure from the voyage, yet, wherever the deviation arises from necessity, force, or any just cause, the underwriter still remains liable, although the course of the voyage is altered. (*c*)

[*249] This rule is illustrated by the following case of *Elton* v. *Brogden*. (*a*) The ship *Mediterranean* went out in the merchants' service with a letter of marque, and bound from *Bristol* to *Newfoundland*, insured by the defendant. In her voyage she took a prize, and returned with it to *Bristol*, and received back a proportional part of the premium. Then another policy was made, and the ship set out, with express orders from the owners, that if another prize was taken, the captain should put some hands on board such prize, and send her to *Bristol;* but that the ship in question should proceed with the merchants' goods. Another prize was taken in the due course of the voyage, and the captain gave orders to some of the crew to carry her to

---

(*b*) 2 Taunt. 428.
(*a*) Sit. at Guild. after Trin. T. 1795. Park Ins. 634.
(*b*) 15 East, 324.
(*a*) 2 Strange, 1264, *post*.
(*c*) 6 T. R. 379, *post*.
(*c*) Roccus, Not. 52.

Bristol, and designed to go on to *Newfoundland:* but the crew opposed him, and insisted he should go back, though he acquainted them with his orders; upon which he was forced to submit, and on his return his own ship was taken, but the prize got in safe. And now in an action against the underwriters, it was insisted, that this was such a deviation as discharged them. But the Court and jury held, that this was excused by the force upon the master, which he could not resist, and therefore fell within the excuse of necessity, which had always been allowed. So the plaintiff had a verdict for the sum insured.

So also in the case of *Scott* v. *Thompson*, (*b*) on a limited policy against sea-risk and fire only, in the course of the voyage insured from *Liverpool* to *Amsterdam*, the ship was carried out of the course of the voyage into *Falmouth* by a king's ship, but being afterwards released, she proceeded towards her destination, and the cargo, which was the subject of the insurance, sustained sea-damage, the underwriters were held liable; for the deviation, which was insisted on as a matter of defence, was not voluntary: and deviation occasioned by force, and deviation by necessity, are the same, for necessity is force.

*Foreign writers upon this subject have enumerated the various [*250] circumstances, which will operate as a justification to the insured, for leaving the direct track of the voyage, upon the ground of necessity and reasonable cause, such as to repair his vessel, to escape from an impending storm, or to avoid an enemy. (*a*)

1. The first ground of necessity which justifies a deviation, is that of going into a port to repair. If a ship is decayed, and goes to the nearest place to refit, it is no deviation, because it is for the general interest of all concerned, and consequently for that of the underwriters, that the ship should be put in a proper condition capable of performing the voyage: so shewn in the case of *Motteaux and others* v. *London Assurance*. (*b*)

The ship *Eyles* being at *Bengal* in the year 1732, the owner employed a Mr. *Halhead* to insure this ship in the *London Insurance Office* for 500*l.*, the adventure thereon to commence from her arrival at *Fort St. George*, and thence to continue till the said ship should arrive at *London;* and that it should be lawful for the said ship in the said voyage, to stay at any ports or places without prejudice. The *Eyles* came to *Fort St. George* in *February*, 1733, in her way to *England;* but being leaky, and in very bad condition, upon the unanimous advice of the governor, council, commanders of ships, &c., she sailed for *Bengal* to be refitted; and after being sheathed, in her return upon her homeward-bound voyage, she struck upon the *Engilee Sands*, and was lost. Evidence was read on the part of the plaintiffs, to prove that *Bengal* was the proper place to refit, and that the ship went thither for that reason; that this was a voyage of necessity, and not a trading voyage, for she took nothing on board but water, provisions, and ballast. When this cause came on to be heard before Lord Chancellor *Hardwicke*, he refused to decide it, but directed an issue at law. His Lordship, however, observed, that the general principles laid down by *the plaintiffs' counsel were right, as stress [*251] of weather, and the danger of proceeding on a voyage, when a ship is in a decayed condition; and in such a case, if she went to the nearest place, he should consider it equally the same, as if she had been repaired at the very place from whence the voyage was to commence, according to the terms of the policy, and no deviation. It is a very material circumstance, that

(*b*) 1 N. R. 181; see Forster v. Christie, *post*.
(*a*) Roccus, 52; Santer de Assecur. part 3, n. 52.
(*b*) 1 Atk. 545.

the governor ordered the lading to be taken out, to shew the necessity of the ship's being repaired; but there is not a syllable of proof why she might not have been equally repaired at *Fort St. George*. His Lordship, therefore, directed an issue to try whether the loss in *July*, 1733, was a loss during the voyage, and according to the adventure which was agreed upon, or intended to be insured. On a trial at *Guildhall*, in the Court of Common Pleas, the jury found in favour of the plaintiffs.

And in the case of *Weir* v. *Aberdein*, (*a*) if a ship in the course of her voyage appear to be too heavily laden, so that it is necessary to lighten her, she may at the next convenient place land and sell part of her cargo. Or if she be found to require ballast, she may at a convenient place take ballast on board, or even goods in the place of ballast.

In the case of *Guibert* v. *Readshaw*, (*b*) was an action on a policy of insurance on the *Nancy*, at and from *La Rochelle* to the coast of *Africa*, during her stay and trade there, and at and from thence to her port of discharge in the island of *St. Domingo*. Three days after the ship sailed from *La Rochelle*, she met with a gale, which strained her seams, and split her mizen-yard and rigging. The crew came in a body to the captain, desiring for the preservation of their lives to make to some port to repair. The vessel being a new one, and the captain finding that she had too little ballast, complied, and put into *Lisbon*, the nearest port; from whence, after taking in five hundred rolls of tobacco as ballast, he *proceeded to the coast of *Guinea*, traded there, and the ship was afterwards captured in the sight of *St. Domingo* before she arrived. The defendant insisted that going into *Lisbon* was a deviation, and called witnesses, who were of opinion, that in the latitude in which the storm happened, there could be no difficulty in repairing all the damage the vessel was described to have received, even in the worst weather, as she might have proceeded to the coast of *Africa*, and repaired there at a less expense; and that a ship, loaded like that in question, could not need additional ballast. On the cross-examination, it came out that the premium would not have varied had the voyage been by the way of *Lisbon*.

[*252]

Lord *Mansfield* left it to the jury, on the ground of necessity to go to *Lisbon* for repairs. He said, that much depended upon the circumstance, that no additional premium would have been required for liberty to touch there. If the jury believed the evidence of the witnesses, they must find for the plaintiff, for that the whole of the defendant's case rested merely upon surmise and suspicions alone. The plaintiff accordingly had a verdict.

2. The next excuse for leaving the direct course is stress of weather. "Upon this point the rule is this, that wherever a ship, in order to escape a storm, goes out of the direct course, or when in the due course of the voyage, is driven out of it by stress of weather, this is no deviation; because it was occasioned by the act of God, which, by a maxim of law, is said to work an injury to no man. It has also been held, that if a storm drive a ship out of the course of her voyage, and she do the best she can to get to her port of destination, she is not obliged to return back to the point from whence she was driven. This rule is exemplified by the following case." *Harrington* v. *Halkeld*. (*a*)

In an action on a policy of insurance of the ship *Atlantic*, warranted to sail with convoy from *England* to *St. Kitts*, on or before the 1st of *August*; the question was, whether there *had been a deviation? The ship was separated from her convoy by a storm. The captain being

[*253]

(*a*) 2 B. & A. 320, *ante*, p. 127.
(*b*) Sit. in Lond. Hil. Vac. 1781. Park Ins. 637.
(*a*) Sit. in Lond. Mich. Vac. 1778. Park Ins. 638.

examined, said, his object, after his separation, invariably was to gain *St. Kitts*, or to fall in with the convoy. That the ship was taken by an *American* privateer in lat. 34, long. 59. Several captains were examined, who swore, that they would have taken the same course to get to *St. Kitts*, or regain the fleet.

Lord *Mansfield*—"The single question is, whether the captain was taken as he was going to *St. Kitts?* If he was not he is perjured. The account he gives is, that on the 28th of *July* there was a storm, which separated the fleet; that he did all he could to get to *St. Kitts*, and to direct his course so as to meet the convoy crossing. The captain goes on the ground not to reason, but to obey, be the consequence what it might. He knows nothing of the insurance: he says to himself, "If I obey, I am doing right." As to the protest, I do not see that it contradicts the captain's evidence. Other captains have looked at the log-book or journal; and they say, they would have held the same course."

Verdict for the plaintiff.

In the case of *Delaney* v. *Stoddart*, (*a*) which was an action upon the case against the defendant, for not having insured a ship and cargo, pursuant to the orders of the plaintiff, by means whereof he was damnified, the ship having been lost. It was tried before Mr. Justice *Buller*, at *Guildhall*, at the Sittings after Trinity Term, 1785; and a verdict was found for the plaintiff.

Upon a motion for a new trial, the facts appeared to be these:—The plaintiff, who lived at *St. Kitts*, wrote a letter to the defendant, dated the 30th of *April*, 1781, informing him that he intended to purchase a ship, and offering the defendant a share. On the 4th of *May*, 1781, he wrote a second letter to the defendant, acquainting him that he had purchased the ship, but had only a share in it himself, the *residue being divided into three or four more shares, one of which he had reserved for the defendant, in case he [*254] should wish to be concerned; and directing an insurance upon the ship at and from *St. Kitts* to *London*, warranted to sail with the convoy. On the 28th of *June*, the defendant wrote to the plaintiff, that he had no objection to a fourth, or a share equal to the plaintiff's. On the 3rd of *July*, the plaintiff informed the defendant, that the ship had left the port to take in her cargo; that she let go an anchor at *Sandy Point*, but as the wind blew fresh, she drove out and could not come in again; that she was obliged to go to *St. Eustatius*, and he therefore hoped that the defendant had not neglected to make the insurance, for fear of accidents. The defendant, on the 19th of *July*, wrote thus to the plaintiff: "The insurance you ordered shall be done." Plaintiff again, on the 25th of *July*, wrote, that the *Friendship* did all in her power to get up from *St. Eustatius*, but could not, and therefore he sold her to Mr. *Ross*, at *Eustatius*. I have already transcribed as much of the several letters as are material to the subject of this section; in addition to which the following facts appeared in evidence:—That the ship *Friendship* had sailed from *St. Eustatius*, on the 1st of *August*, with the convoy, and that she had afterwards foundered at sea; that *St. Eustatius* is in the direct road to *London* from *St. Kitts*, and the convoy from *St. Kitts* always looked into *St. Eustatius*, to take up any ships that might be there; but if the *Friendship* had sailed from *St. Kitts*, she must have gone by *Eustatius;* but would not have stopped there: that when she was driven to *St. Eustatius*, after making several efforts to get back to *St. Kitts* to finish her loading, and finding she could not succeed, she then took in the rest of her loading at *St. Eustatius*.

At the trial, several grounds of defence were made; but the only one material for our consideration was, that the remaining at *St. Eustatius*, and not

(*a*) 1 T. R. 22.

going back to *St. Kitts*, was a deviation. The learned Judge, who tried the cause, was of opinion that it was not a deviation, being occasioned [*255] *by stress of weather. Upon this ground, amongst others, the motion for a new trial was founded. After argument at the Bar,

Lord *Mansfield* said,—"The only material question is, Whether there is a deviation in this case? and that depends on the evidence. If a storm drive a ship out of her voyage into any port, and being there she does the best she can to get to her port of destination, she is not obliged to return back to the point from whence she was driven; but here the witnesses say, she tried to get back to *St. Kitts*, and could not: and it is a much easier navigation to go directly from *St. Eustatius* to *London*, than to go back to *St. Kitts* first. And as to the taking in the cargo at *St. Eustatius*, I do not find that the ship lost any time by it. Every thing is the effect of the storm, and occasioned by it. This is the only point on which I had any doubt, and it required some consideration. It was a question, which was proper to be left to a jury, whether this was the same voyage or not, and they have determined it."

But in every case in which the excuse of necessity is pleaded, whether it arise from the act of God or from any other insurmountable cause, it must be clearly made apparent that the deviation was entirely in consequence of such cause, and that was no default on the part of the assured or the master of the ship.

This principle of the rule in these cases was confirmed in a case before Lord *Eldon*, when Lord Chief Justice of the Common Pleas, in the case of *Wolfe* v. *Claggen*. (*a*) The insurance was from *Altona* to *Surinam*, the defence made was "deviation," the vessel having put into *Plymouth*, out of the course of the voyage, and remained there fourteen days. The answer on the part of the plaintiff was, that the captain was taken ill with a severe fit of the gravel, and that the mate having pricked his finger, by accident, his hand and arm swelled to such a degree, as to render him incapable of *doing his [*256] duty, and that they had put into *Plymouth* for the purpose of procuring medical assistance. These facts, as to the captain's and mate's illness, and their application to a surgeon, were proved: but it also appeared, on cross-examination, that the surgeon of the ship was unprovided with proper instruments and medicines. He was not called.

Lord *Eldon* said, he was of opinion that if by the visitation of God so many of the crew, who would otherwise have been sufficient, became so afflicted with sickness, as to be incapable of navigating the ship, such an illness of the crew was a necessity which might justify a deviation: but when it was set up as a justification of a deviation, he thought it incumbent on the plaintiff to shew that he had so far provided against such events, by every proper precaution, such as having medicines for the voyage, as much as he was bound with respect to the tightness of the ship. It was in evidence that a surgeon was necessary in such voyages: if, therefore, sickness was to be set up as an excuse for deviation, the plaintiff should shew that the surgeon was provided with such medicines and instruments as would probably become necessary in the course of the voyage, to meet the common casualties of the mariners. He was also of opinion, that the necessity for going into port ought to be made out by the plaintiff beyond all possibility of doubt, and that it arose and existed without any default of the master or party insuring: and if they came in for medical aid, he should expect medical men to be called to prove that such necessity existed. That had not been done in the case then before him, and the plaintiff must be nonsuited."

(*a*) 3 Esp. 257.

3. A deviation may also be justified, if done to avoid an enemy, or seek for convoy; because it is in truth no deviation to go out of the course of the voyage, in order to avoid danger, or to obtain protection against it.

In an action upon a policy, in the case of *Bond* v. *Gonsales*, (*d*) which was to insure the *William Galley* in a voyage *from *Bremen* to the [*257] port of *London*, warranted to depart with convoy; the case was this:—The *Galley* set sail from *Bremen*, under the convoy of a *Dutch* man-of-war to the *Elbe*, where they were joined by two other *Dutch* men-of-war, and several *Dutch* and *English* merchant ships, whence they sailed to the *Texel*, where they found a squadron of *English* men-of-war and an admiral. After a stay of nine weeks, they set out from the *Texel*, and the *Galley* was separated in a storm, and taken by a *French* privateer, taken again by a *Dutch* privateer, and paid 80*l.* salvage.

It was ruled by Lord Chief Justice *Holt*, that the voyage ought to be according to usage, and that their going to the *Elbe*, though in fact out of the way, was no deviation, for till after the year 1703, there was no convoy for ships directly from *Bremen* to *London*. And the plaintiff had a verdict.

And in the cases of *Gordon* v. *Morley*, and *Campbell* v. *Bordieu*, (*a*) on an insurance from *London* to *Gibraltar*, warranted to depart with convoy, it appeared there was a convoy appointed for that trade at *Spithead;* and the ship *Ranger* having tried for convoy in the *Downs*, proceeded to *Spithead*, and was taken in her way thither. The insurers insisted that this being the time of a *French* war, the ship should not have ventured through the Channel, but have waited in the *Downs* for an occasional convoy. And many merchants and office-keepers were examined to that purpose.

But Lord Chief Justice *Lee* held that the ship was to be considered as under the defendant's insurance to a place of general rendezvous, according to the interpretation of the words warranted to depart with convoy. And if the parties meant to vary the insurance from what is commonly understood, they should have particularised her departure with convoy from the *Downs*. The juries were composed of merchants; and in both cases they found for the plaintiffs upon the strength of this direction.

In the case of *Bond* against *Nutt*, (*b*) in which the material [*258] *question was, whether a warranty had or had not been complied with, the point of deviation for the purpose of procuring convoy also came under the consideration of the Court. Upon that occasion Lord *Mansfield* and the whole Court held, that if a ship go to the usual place of rendezvous, for the sake of joining convoy there ready, though such place be out of the direct course of the voyage, it is no deviation.

And in a subsequent case of *Enderby* v. *Fletcher*, (*a*) the only question was, whether there was a deviation or not? Lord *Mansfield* there directed the jury to find for the plaintiffs, if they believed that the captain fairly and *bonâ fide* acted according to the best of his judgment; that he had no other view or motive but to come the safest way home, and to meet with convoy: for that it was no deviation to go out of the way to avoid danger.

Where in the case of *Salisbury* v. *Townson*, (*b*) a ship was insured from *Liverpool* to *Jamaica*, and had put into the *Isle of Man*, it appeared that there were *some intances* of the *Liverpool* ships putting in there, but it was not the settled, common, established, and direct usage of trade: it was held to be

---

(*d*) 2 Salk. 445.
(*b*) Cowp. Rep. 601.
(*a*) Sit. in Lond. Trin. Vac. 1780; Park Ins. 646.
(*b*) Park Ins. 647.
(*a*) 2 Stra. 1265, *ante*, 198.

a deviation, and the underwriters were discharged from any loss that happened subsequent to the deviation.

In the case of *Lawrence* v. *Sydebotham*. (*c*) Mr. J. *Lawrence*.—"As to deviation for the purpose of succouring ships at sea in distress, it is for the common advantage of all persons, underwriters and others, to give and receive assistance to and from each other in distress."

See the judgment of Sir W. *Scott* in the *Beaver*. (*d*) And see the case of the *Jane*. (*e*) In *America*, it has been held that such deviation does not create a forfeiture of the policy. (*f*)

It may be considered now settled by a variety of recent cases, that a liberty
[*259] "to touch and stay at any ports or places *whatsoever, for all purposes, must be taken to mean, for some purpose connected with the voyage. (*a*)

So also if a ship be insured upon a trading voyage, it is incumbent on the parties assured, to carry on that trade with usual and reasonable expedition, otherwise their conduct will amount to a deviation, and discharge the policy.

Thus, in the case of *Hartley* v. *Buggin*, (*b*) an action by the assured against an underwriter on a policy of insurance on the ship *Blossom*, at and from the coast of *Africa* to the *West Indies*, with liberty to exchange goods and slaves; a verdict was given for the plaintiff. But upon a rule being obtained to shew cause why there should not be a new trial, it appeared that there had been a great deal of contradictory evidence, and many points started at the trial; but the question now made was, whether the plaintiff, by the use he made of the vessel on the coast of *Africa*, and the delay he there occasioned, was not the cause of the loss; that is, whether he did not make such use of her during her stay on the coast, contrary to the design of the policy, as amounted to a deviation?

It appeared in evidence, that this ship stayed on the coast from *August* to *March;* that she was employed in receiving slaves on board, the produce of the cargoes of other ships, which were afterwards put on board other ships, and sent to the *West Indies;* that this is the employment of what they call a *factory ship;* but that a regular factory ship is thatched and covered, and receives the slaves till a sufficient number is collected to send away in the vessels; but it did not appear that any slaves, the produce of the *Blossom's* own cargo, were sent away in other vessels, but that her stay there was several months beyond the usual stay of ships in that trade. After argument at the Bar,

[*269] *Lord *Mansfield* said—"When different points are agitated at a trial, and a great deal of evidence applied to each, and the counsel go out of the cause, it is not to be wondered at, if juries should lose their attention to the material point. The great advantage of a motion for a new trial is, that after argument on the motion, the cause goes down again, winnowed from the chaff of the first trial. The single point here is, whether there has not been what is equivalent to a deviation, whether the risk has not been varied? It is not material whether or not the risk has been greater. If a ship insured for a trade, is turned into a floating warehouse, or a factory

(*c*) 6 East, p. 54. (*d*) 3 Rob. A. R. 292.
(*e*) 2 Hagg. 345, and Waterloo, 2 Dod. A. R. 443.
(*f*) Kent's Com. on the Law of America, vol. iii. p. 16.
(*a*) See Langhorne v. Allnutt, 4 Taunt. 519. Rucker v. Allnutt, 15 East, 276. Solly v. Whitmore, 5 B. & A. 45. Bottomley v. Bovill, 5 B. & C. 210. Warre v. Miller, 4 B. & C. 538, *ante*, p. 179.
(*b*) B. R. Mich. 22 Geo. 3. Park Ins. 652. See also Williams v. Shee, 3 Camp. 469. Hammond v. Reid, 4 B. & A. 72.

ship, the risk is different, it varies the stay; for while she is used as a warehouse, no cargo is brought for her. The law being clear, how is the fact? The captain says she was not used as a factory ship; his evidence is much impeached; but he says he was young in the trade; he never saw a factory ship but once, and was not in her; he might have a salvo, because this was not thatched; but was she used as a thatched ship is used? It is said that letters are not records; it is true they may be contradicted; but if they are from the parties, and are not contradicted, they are as strong as any records. The fact is clear, the risk is different in point of length," &c. Rule absolute for a new trial. (*a*)

So in the case of *Parkinson* v. *Collier*, (*b*) which was an action on a policy from *London* to *Port Eudick*, on the coast of *Africa*, at six guineas *per cent.* on the ship till moored at anchor twenty-fours, and on goods till discharged and safely landed. The ship arrived on the coast on the 6th of *May*, and was captured by the *French* on the 4th of *June*. The barter in the trade is carried on, on board the vessel, and the goods afterwards sent on shore, in boats, and the gums brought back. In this case, the discharge of the cargo had not begun, the gums not having been brought down to the coast, for which purpose it is necessary to have a previous *agreement with the king of the country; but no delay had been used. The counsel for the de- [*261] fendant contended, that by the custom of this trade, the risk on the goods, as well as on the ship, expired in twenty-four hours, and that the risk on the cargo, while on the coast, was protected by homeward policy, at fifteen guineas *per cent.*. Lord *Kenyon* refused the evidence, both of the homeward policy, and of this supposed usage, (which he had on a former occasion admitted against his own opinion, and on which a new trial had been granted) to qualify the clear and unequivocal language of the policy, which covered the risk, till the goods were landed. That if, in landing, any unnecessary delay had been used, that might amount to something in the nature of a deviation, so as to discharge the insurer; but that did not appear to be the case in the present instance.

But though an actual deviation from the voyage insured is thus fatal to the contract of insurance; yet a deviation merely intended, but never carried into effect, is considered as no deviation, and the insurer continues liable. (*a*) This has been frequently so decided. Thus in the case of *Tasker* v. *Wilmer*, (*b*) which was an insurance from *Carolina* to *Lisbon*, and at and from thence to *Bristol:* it appeared, that the captain had taken in salt, which he was to deliver at *Falmouth* before he went to *Bristol;* but the ship was taken in the direct road to both, and before she came to the point where she would have turned off to *Falmouth*. It was held, that the insurer was liable; for it is but an intention to deviate, and that was held not sufficient to discharge the underwriter.

In the case of *Carter* v. *The Royal Exchange Assurance Company*, (*c*) where the insurance was from *Honduras* to *London*, and a consignment to *Amsterdam;* a loss happened before she came to the dividing point between the two voyages, for which the insurers were held liable to pay.

*From the proposition just established, namely, that a mere [*262] intention to deviate will not vacate the policy, it follows as an

---

(*a*) See Mount v. Larkins, 8 Bing. 108, *ante*, p. 177, and Freeman v. Taylor, 8 Bing. 124.

(*b*) Sit. in B. R. after Mich. 1797. Park Ins. 653. Phillips v. King, *ante*, pp. 177, 226.

(*a*) See *ante*, p. 234, by Lord Eldon, in Tasker v. Cunningham, 1 Bligh, 87.

(*b*) 2 Stra. 1249. (*c*) 2 Stra. 1249.

immediate consequence, that whatever damage is sustained before actual deviation, will fall upon the underwriters.

Thus it was held by Lord Chief Justice *Holt*, in the case of *Green* v. *Young*, (*a*) who said, that if a policy of insurance be made to begin from the departure of the ship from *England*, until, &c., and after the departure a damage happens, &c., and then the ship *deviates*; though the policy is discharged from the time of the deviation, yet for the damages sustained before the deviation, the insurers shall make satisfaction to the insured.

So in the case of *Hare* v. *Travis*, (*b*) upon an insurance "from *Liverpool* to *London*," it appeared at the trial that the captain had taken in goods for *Southampton* as well as *London*. Having loaded his vessel with goods partly for one place and partly for the other, Lord *Tenterden* held, that it ought to be inferred that he sailed on a voyage to both places, and that so long as the vessel continued in that course which was common to a voyage either to *Southampton* or *London*, she was sailing on the voyage insured; but as the policy did not contain a liberty to put into *Southampton*, the putting into that port was a deviation, and the underwriters were not responsible for any loss which accrued subsequently. But as it appeared, however, that the vessel had met with very bad weather in the early part of the voyage, he left it to the jury to say, whether before the vessel came to the dividing point the assured had sustained a loss by the perils of the sea. The jury found that they had, and the Court afterwards upon motion supported the verdict.

[*263] *SECTION VIII.

"THE SAID SHIP, ETC., GOODS, ETC., ARE VALUED AT ——."

The head of this section is important, although what is necessary to be said upon it will, nevertheless, lie in a small compass. The assurers here say, "The said ship, &c., goods and merchandises, &c., for so much as it concerns the assured, by agreement between the assured and assurers in this policy, are and shall be valued at ——."

When the blank space is filled up by the assured, the policy then becomes that which is designated as a "*valued* policy." If the blank be not filled up by the assured, the policy is then said to be *open*. The only difference between them consists in this, that in the former, the goods or property insured are valued at a certain price, viz: the prime cost of the property insured, or the value mentioned in the policy; in the latter, the value is not stated, but requires proof when necessary, and consists of the invoice, price, shipping charges, and premium of insurance. (*a*) Lord *Mansfield*, in the case of *Lewis and another* v. *Rucker*, (*b*) puts the construction of the meaning of a

---

(*a*) 2 Lord Raymond, 840; 2 Salk. 444, S. C. *post*.

(*b*) 7 B. & C. 14. And see the case of Middlewood v. Blakes, 7 T. R. 162, and also Heselton v. Allnutt, 1 M. & S. 46, where the several cases immediately preceding on the distinction between deviations intended, but not carried into effect, and non-inception of the voyage insured, are much considered.

(*a*) By the usage at Lloyd's, where liberty is given by the policy to "declare and value" after the policy is effected, and no declaration or valuation is indorsed on the policy, it is considered as an open policy. 2 B. & Ad. 651. Harman and others v. Kingston, 3 Camp. 150.

(*b*) 2 Burr. p. 1170.

valued policy upon very clear grounds. In answer to an objection to the rule adopted by the defendant, and by the jury in that case of the rule of apportionment of a partial loss, viz: "that of taking the proportion of the difference between sound and damaged at the port of delivery, and paying that proportion of the value of the goods specified in the policy. The defendant says the proportion of the difference is equally the rule whether the goods come to a rising or falling market. For *instance, suppose the value in the policy 30*l.*: the goods are damaged, but sell for 40*l.*: had they [*264] been sound they would have sold for 50*l.*: the difference is one-fifth: he pays that proportion on the prime cost or value in the policy (*i. e.* 6*l.*;) if they come to a losing market for 10*l.*, being damaged, but would have sold for 20*l.*, if sound, the difference is one-half, and the defendant must pay one-half of the prime cost or value in the policy (*i. e.* 15*l.*). To this rule two objections have been made: the first objection is, that it is going by a different measure in the case of a partial from that which governs in the case of a total loss, for upon a total loss the prime cost or value in the policy must be paid.

Answer.—"The distinction is founded in the nature of the thing. Insurance is a contract of indemnity against the perils of the voyage; the assurer engages, so far as the amount of the prime cost or value in the policy, "that the thing shall come safe," he has nothing to do with the market; he has no concern in any profit or loss which may arise to the merchant from the goods: if they be totally lost, he must pay the prime cost, that is the value of the thing he insured at the outset: he has no concern in any subsequent value. So, likewise, if any part of the cargo, capable of a several and distinct valuation at the outset, be totally lost, as if there be 100 hogsheads of sugar, and 10 happen to be lost, the assurer must pay the prime cost of those 10 hogsheads, without any regard to the price at which the remaining 90 are sold. But where an entire individual, as one hogshead, happens to be spoiled, no measure can be taken from the prime cost to ascertain the quantity of such damage, but if he can fix whether it be a third, fourth or fifth worse, the damage is to a mathematical certainty. How is it to be found out? Not by any price at the outset port, but it must be at the port of delivery where the voyage is completed, and the whole damage known. Whether the price there be high or low, in either case it equally shew whether the damaged goods are a third, fourth, or fifth worse than if they had come sound; consequently, whether the injury sustained be a third, *fourth, or fifth of the value of the thing, and as the assurer pays the whole prime cost if the thing be wholly lost, so if it be [*265] only a third, or fourth, or fifth worse, he pays a third, fourth or fifth of the value of the goods so damaged. The next objection with which this case has been much entangled, is taken from this being a "valued" policy. I am a little at a loss to apply the arguments drawn from thence. It is said, "that a *valued* is a *wager* policy," (like interest or no interest,) if so, there can be no average loss, and the assured can only recover as for a total loss, abandoning what is saved, because the value specified is fictitious."

Answer.—"A valued policy is not to be considered as a wager policy, or like 'interest or no interest,' if it was it would be void by the act of 19 Geo. 2, c. 37. The only effect of the valuation is fixing the amount of the prime cost, just as if the parties admitted it at the trial, but in every argument, and for every other purpose, it must be taken the value was fixed in such a manner as that the assured meant only to have an indemnity. If it be undervalued, the merchant himself stands insurer of the surplus. If it be much overvalued, it must be done with a bad view, either to gain contrary to the act before mentioned, or with some view to a fraudulent loss; therefore the assured can never be allowed in a Court of Justice to plead that he has greatly overvalued, or that his interest was a trifle only. It is settled, 'that upon valued policies the

assured need only prove some interest to take it out of the stat. 19 Geo. 2, because the adverse party has admitted the value, and if more was required, the agreed valuation would signify nothing; but if it should come out in proof that a man had insured 2000*l.*, and had interest on board to the value of a cable only, there never has been and I believe there never will be, a determination that by such an evasion the act may be defeated. There are many conveniences from allowing valued policies, but where they are used merely as a cover to a wager, they would be considered as an evasion. The effect of the valuation is only fixing conclusively the prime cost. If it be an open policy, the prime cost must be proved; *in a valued policy it is agreed. To [*266] argue 'that there can be no adjustment of an average loss upon a valued policy,' is directly contrary to the very terms of the policy itself. It is expressly subject to average, if the loss upon sugars exceed 5 per cent.; if it was not, the consequence would not be that every partial loss must therefore become total, but the event, to entitle the assured to recover, would not happen unless there was a total loss."

In the late case of *Young* v. *Sir J. H. Irving. Bart., and others*, (*a*) which was tried before *Tindal*, C. J., at the Sittings at *Guildhall* after Hil. Term, 1836. At the trial, two objections to the charge of the Chief Justice were taken. The first (which is the only one connected with our present inquiry) was this, "that the Chief Justice ought to have told the jury, that in determining whether the loss was partial or total, they ought to take into their consideration the estimated value of the ship in the policy." The bill of exception came on in the Exchequer Chamber, when Lord *Abinger* said, "I am not aware of any case or principle in the law of insurance which makes the estimated value in the policy a circumstance upon which the question of total or partial loss ought to turn. The agreed value in the policy of the subject insured, is to save the expense and doubt that may attend the investigation of value, as affecting the quantum of compensation only. It may operate, according to events, to the detriment or advantage of either party, and where no fraud exists both are bound by it. We are of opinion that there is no ground for the first exception."

In the case of *Thelluson* v. *Fletcher*, (*b*) which has already been referred to in this Treatise, as a case shewing that the 19 Geo. 2, c. 37, does not apply to foreign ships: I now again refer to it, on the subject now under our consideration. This was a rule to shew the inquisition on a writ of inquiry in an action should not be set aside. The material part of the policy for our now purpose, was in these words.—"On *all goods loaden or to be [*267] loaden aboard the ships, *Le Soigneux*, *La Pucelle* and *Le Vainquer*, all or any of them: the said goods and merchandises, by agreement are, and shall be valued at (*c*) on twenty-five casks of clayed sugar, and twelve hogsheads of *Muscovados:* the policy to be deemed sufficient proof of interest in case of loss." The defendant had underwritten 300*l.*, and having suffered judgment by default, the jury, on the writ of inquiry assessed the damages at that sum, without any proof of the amount or value, or any evidence whatever, except of the defendant's handwriting to the policy. After the argument at the Bar; the Court said, that the only affidavits that could have been here, was from the circumstance of there being three ships, but the second count was so framed (the count averring that the goods were shipped on board the three ships, or some, or one of them, to the amount insured, and that two of them had been captured, and the other lost) as to make the case the

(*a*) 9 Scott's N. R. 752.
(*b*) 1 Doug. 315, *ante*, p. 32.
(*c*) This was left blank as here printed.

same as if there had been but one. By suffering judgment, the defendant had confessed the plaintiff's title to recover, and the amount was fixed by the stipulation in the policy. Rule discharged.

SECTION IX.

TOUCHING THE ADVENTURES AND PERILS, ETC.

THE assurers, in this section, commence by referring to the risks and adventures which they (the assurers) are contented to bear, and take upon themselves in the voyage insured, and afterwards they proceed to enumerate them. It is our purpose in the present section, to confine ourselves to some general observations on the adventures and perils, which the assurers take upon themselves, and to refer to some general rules and principles of the law of marine insurance upon this particular head of the subject; and in *regard to which, [*268] I may observe, that it is most important to have clear ideas upon these rules and principles, upon which the Courts in modern times have construed this part of the policy. And I may preface the following matter, by a few observations, on the grounds upon which the Courts have decided many cases relating to the perils insured against, and on the advantages which, in this respect, the assured possess over the assurers.

The contract of which we are treating, must undoubtedly be looked upon, in respect of the nature of the element upon which it is to be performed, as subject to much more uncertainty, and to many more vicissitudes than any other contract known to the law. The difficulties of proving the real causes of disasters at sea, and to the well known contradictory evidence which is given at the trial on seafaring matters, make it exceedingly difficult to arrive at the fact of "whether the loss or misfortune, in many instances, arose from one cause or from another." The Courts of Law, in this country especially, bearing this in mind, and sensible of the strictness of the rule binding the assured, of the implied warranty of the seaworthiness of the bottoms, (upon which the insurance is made) and also considering the payment of the premiums paid by the assured to the underwriter, by agreement, at the time, the underwriter always acknowledging the receipt of it, have laid down many rules in such cases, to prevent the underwriters shaking off their responsibility, on the plea of some uncertainty in the proof of the manner in which the loss happened. I shall briefly advert to what, I believe, to be the principal rules, principles, and maxims of the law, which the Judges have applied to this contract more particularly than to any other: this, in the following sections, will be found to be satisfactorily demonstrated.

The first rule which I shall mention is this, viz:—"That the immediate and not the remote cause of the loss, is that which is looked to by the Court in considering the question, whether the accident come within the perils insured against by the underwriters; and if this be covered by the terms [*269] *expressed in the policy, they have held the underwriters liable, notwithstanding the event may be attributable, in the first instance, to a remote cause of a different description." "It were infinite," says Lord *Bacon*, (*a*) "for the law to judge the causes of causes, and of their impulsions on one

---

(*a*) Maxims of the Law, p. 35, of Law Tracts, 1737.

another: and, therefore, it contenteth itself with the immediate cause, and judgeth of acts by that, without looking to any farther degree." Such must always be understood to be the mutual intention of the parties to the contract of marine insurances. Thus, for instance, (*b*) "where 'fire' is expressly mentioned in the policy, as one of the perils against which the underwriters undertake to indemnify the assured, it is of no consequence whether this is occasioned by a common accident, or by lightning, or by an act done in duty to the state. Nor can it make any difference, whether the ship is thus destroyed by third persons, officers of the king, or by the captain and crew, acting with loyalty and good faith. Fire is still the '*causa causans*' and the loss is covered by the policy." And this is agreeable to the law in *France* upon the subject; (*c*) and see the case of *Jones* v. *Schmoll*, (*d*) decided by Lord *Mansfield*, on the same point.

It is also a maxim of the law of marine insurance "that the assured having provided a sufficient crew and captain of competent skill at the commencement of the voyage, makes no warranty that they shall do their duty during the continuance of it, nor are the underwriters discharged from their liability, in case of a loss occasioned immediately by one of the perils insured against, although remotely owing to the negligence of the master and crew." This principle of the law of marine insurance, will be found to be supported by various authorities.

[*270] We now proceed to the consideration of the several perils *enumerated in the policy, against the consequences arising out of which, the assurers have undertaken to keep the assured harmless.

SECTION X.

PERILS OF THE SEA, FIRE, ETC. (*a*)

THE assurers say that "the perils which they are contented to take upon themselves are of 'the sea,' and of 'fire.'" Of these, therefore, in their order.

In the first place, it may be said generally that every accident which happens to a ship during her voyage by the mere act of God is to be considered as a "peril of the sea;" for every loss which arises "from tempests, or by rocks, winds, or waves," (*b*) *strictly* and *naturally* come under the idea of a loss occasioned by "the perils of the sea."

But where, as in the case of *Green* v. *Elmslie*, (*c*) the ship when on her voyage was driven by a hard gale of wind on the coast of *France*, and was there captured by the enemy, she did not receive any damage from the wind, (the insurance was against capture only,) it was contended for the defendant that this was a loss by the "perils of the sea," and not by capture, and that the defendant was not liable upon that policy. But Lord *Kenyon* said, that the case was too clear to admit of argument: this was clearly a loss by cap-

(*b*) Gordon v. Rimmington, 1 Camp. 132.

(*c*) Pothier traité du Cont. d'Assur. s. 53. Valin, liv. 3, tit. 6. Des Asurrances, art. 26; 1 Emerig. p. 434.

(*d*) 1 T. R. 130, note (*a*).

(*a*) I have altered the order in this part by putting the peril of "fire" before that of men-of-war.

(*b*) Jefferyes v. Legendra, 1 Show. 323. (*c*) Peake, 212.

ture; for had the ship been driven on any other coast than that of an enemy, she would have been in perfect safety. Verdict for the plaintiff.

In the case of *Hodgson* v. *Malcolm*, (*d*) where it became necessary, in moving a ship from one part of a harbour to another, to send two of the crew on shore to make fast a new* line, and to cast off a rope by which the ship was made fast, and those two men being immediately [*271] impressed, and carried away, and not being allowed by the pressgang to cast off the rope in question, the ship, in consequence thereof, went ashore, and was lost. Three Judges of the Court of Common Pleas, viz: Mr. J. *Heath*, Mr. J. *Rooke*, and Mr. J. *Chambre*, held this to be a loss (within the meaning of the policy) by "perils of the sea," contrary to the opinion of Chief Justice Sir J. *Mansfield*.

In the case of *Livie* v. *Janson*, (*a*) (which will be mentioned afterwards, with reference to another and more important point in the case,) the action was on a policy of insurance on an *American* ship, "at and from *New York* to *London*," warranted free from "*American* condemnation." The facts were shortly the following:—The ship, in order to elude her national embargo, slipped away in the night, and was driven by the ice, wind, and tide, on shore, and was ultimately condemned by the *American* government, for breach of the embargo. The underwriters were discharged.

But where, in the case of *Hahn* v. *Corbett*, (*b*) an insurance was made on goods on board a ship, "warranted free from capture and seizure," and the ship was stranded on a shoal, within a few miles of the port of her destination, and was lost; but whilst she lay on the sand she was seized by the commander of the place, and her goods were confiscated by him. This was held to be a loss by perils of the sea.

And in the case of *Bondrett* v. *Hentigg*, (*c*) which was an action on an insurance on goods, and where the ship was actually wrecked, part of the goods lost and part got on shore, but whilst on shore were destroyed and plundered by the inhabitants, so that no part of them again came into the possession of the assured. Lord Chief Justice *Gibbs* was of opinion that this was a loss by perils of the sea.

And in a very recent case of *Redman* v. *Wilson*, in which judgment was given by *Parke*, B. (*d*) "and which was an action *on a policy of insurance made on the ship "*Wellington*," trading "to and from [*272] *Sierra Leone*," at the trial the jury returned a verdict for the plaintiff. The defendant moved for, and obtained a rule, calling upon the plaintiff to show cause why the verdict should not be set aside and a new trial had, on the ground that the loss had been occasioned by the negligence of the party in charge of the vessel. During the trial it was proved, that the ship had sprung a leak, and that with the hope, at all events, of saving part of the cargo, the captain had run her ashore, where, ultimately, she had gone to pieces. It was contended for the defendant that this was not one of the perils of the sea. The Court were of opinion that it was one of "the perils of the sea," and, moreover, that there had been no proof whatever of any neglect. The rule must, therefore, be discharged."

But although, as was said in the previous section, the Courts are liberal in construing this part of the contract, yet they will, at the same time, be cautious not to extend the principle so as to make the acts of the parties operate beyond their intention, and will be guided by the terms used in the policy to see whether

---

(*d*) 2 N. R. 336.
(*b*) 2 Bing. 205.
(*d*) 29th June, 1845, MS. *penes me*.
(*a*) 12 East, 648.
(*c*) 1 Holt, 149.

a certain loss, which has happened, is covered by the terms used in the policy to fix the risks against which the underwriter has subscribed.

And therefore in the case of *Gregson* v. *Gilbert*, (*d*) which was an action on a policy of insurance on the value of certain slaves insured by the policy. The declaration stated "that by perils of the sea, contrary winds, currents, and other misfortunes, the voyage was so much retarded that a sufficient quantity of water did not remain for the support of the slaves and other people on board; that certain of the slaves mentioned in the declaration perished for want of water. The facts, as they appeared by the evidence, were, that the ship, being bound from *Guinea* to *Jamaica*, had missed the island, and the crew were reduced to great distress for want of water; that the captain consulted with the crew, [*273] and it was *unanimously agreed upon that some of the slaves should be thrown overboard, in order to preserve the rest: that at the time of this resolution there remained but one day's full allowance of water, at two quarts per man. The jury, upon this evidence, found a verdict for the plaintiff, with damages 30*l.* a head for every slave thrown overboard. A motion was afterwards made for a new trial, upon the ground that this was not a loss by "perils of the sea."

Lord *Mansfield.*—"This is a very uncommon case, and deserves a further consideration. There is great weight in the objection, that the loss is stated by the declaration to have arisen from the "perils of the sea," and that the currents, &c., made the ship foul and leaky. Now, does it appear by evidence that the ship was foul and leaky? On the contrary, the loss happened by mistaking *Jamaica* for another place. Besides, a fact has been mentioned by the counsel, of throwing some slaves overboard, after the rain fell—a fact which is not agreed on by both sides, though a very material one."

Mr. Justice *Buller.*—"The declaration does not in any part of it, state the loss which has been the occasion of this demand; and it would be very mischievous if we were to overturn this objection. Suppose, for a moment, that the underwriters, in some cases, are liable for the mistake of the captain, yet, if they are not liable in others, the nature of the loss must be stated in the declaration, that the defendant may have an opportunity of moving in arrest of judgment, if it be not sufficiently alleged. But it would be impossible for the defendant in this case to move in arrest of judgment: for the facts of the case, as proved, are different from those stated in the declaration. The point of law in arrest of judgment can only be argued from the facts stated on record; and the declaration in this case states the loss of the plaintiff to have happened by perils of the sea." The rule for a new trial was made absolute, on payment of costs.

A loss occasioned by another vessel running down the ship insured, is a loss [*274] by peril of the sea: although there be *negligence on the part of the ship insured, as well as on that of the other vessel, *Smith* v. *Scott.* (*a*)

In the case of the *Woodrop Sims*, Sir W. *Scott*, (*b*) lays down the following rule as to the mode in which the damage is to be borne by the two vessels in different cases. He says, "There are four possibilities under which an accident of this sort may occur. In the first place, it may happen without blame being imputable to either party; as where a loss is occasioned by a storm, or by any other *vis major:* in that, the misfortune must be borne by the party on whom it happens to light; the other not being responsible to him in any degree. Secondly, a misfortune of this kind may arise when both parties are

(*d*) B. R. 23 Geo. 3. Park Ins. 138.
(*b*) 2 Dod. Ad. Rep. 85.
(*a*) 4 Taunt. 126.

to blame; where there has been a want of due diligence and skill on both sides: in such a case, the rule of law is, that the loss must be apportioned between them as having been occasioned by the fault of both of them. Thirdly, it may happen by the misconduct of the suffering party alone; and then the rule is that the sufferer must bear his own burthen. Lastly, it may have been the fault of the ship which ran the other down; and in this case the injured party would be entitled to an entire compensation from the other."

In *Emerigon* there is the following passage: (*c*)—"Si l'abordage n'est pas arrivé par cas fortuit, et qu'il soit impossible de savoir par la faute de qui, c'est alors le cas de partager le differend, et de faire supporter la moitié du dommage à chacun des deux navires. Tel est le sens de l'art 10 titre des avaries. En cas d'abordage de vaisseaux, il est dit, le dommage sera payé également par les navires qui l'auront fait et suffert, soit en route, rade, ou en port." And he cites, for this position, *Les Jugemens d'Oleron*, art. 14; *L'Ordonnance de Wisbuy*, art. 26, 27, 50 and 70; and *Le Droit Anseatique*, tit. 10. And the editor, M. Boulay-Paty, (*d*) says, that the law is, that if there be doubt, in the *case of collision, as to the cause, each vessel is to bear its part— and he adds, "La loi considère donc comme les vraies causes du [*275] dommage la fortune de mer, la force majeure qui a poussé les navires l'un sur l'autre; et dans ce cas, la portion qui incombe au navire assuré doit etre à la charge des assureurs, qui, par la nature du contrat d'assurance, sont tenus de tous les accidens arrivés sur mer, quelques insolites, inconnus ou extraordinaires qú'ils soint." (*a*)

And Pothier, (*b*) says, "L'assureur se charge par le contrat d'assurance, des risques de tous les cas fortuits qui peuvent survenir par force majeure durant le voyage, et causer à l'assuré une porte dans les choses assurées ou par rapport aux dites choses."

But we have already seen that the Courts of law in this country, look to the *direct* and *immediate consequence* of a peril insured against, and not to a remote one: (*c*) and a mere remote consequential damage arising from such an accident would not fall upon the underwriters. Thus in the case of *De Vaux* v. *Salvador*, (*d*) where a collision between two vessels had taken place, and there was fault on each side, the Court of King's Bench held, that although the underwriters were as a matter of course, liable for the direct injury sustained by the insured vessel, yet that they were not liable for the amount of a sum of money which a foreign Court of Admiralty awarded, to be repaid by the insured vessel to the other, in consequence of her having done that vessel more damage than she herself had received.

The Court of King's Bench have been of opinion, that where a vessel was sunk at sea, by another vessel firing upon her, mistaking her for an enemy, if not a *peril of the sea*, as *some of the Judges thought*, was a *loss within the policy*, as being a *peril, loss and misfortune, under the general words* *of the *policy*, sustained in the course of her navigation on [*276] the sea. (*a*)

In the case of *Tatham* v. *Hodgson*, (*b*) which was an insurance upon slaves against perils of the seas, their death by failure of sufficient and suitable provision, though that failure was occasioned by extraordinary delay in the voyage from bad and stormy weather, was holden not to be a loss within the policy by

---

(*c*) Vol. 1, p. 413 (ed. 1827.) (*d*) Page 417.

(*a*) And see Boulay-Paty, Cours de Droit Commercial Maritime, tit. x. s. 16, tom. 4, p. 16.

(*b*) Traité du Contrat d'Assurance, ch. 1, sect. ii, art. 2, § 2, 49.

(*c*) See *ante*, p. 93. (*d*) 4 A. & E. 420.

(*a*) Cullen v. Butler, 5 M. & S. 461. (*b*) 6 T. R. 656.

perils of the sea, but a loss by natural death, which cannot now be insured against since the statutes for regulating the manner of carrying slaves in British vessels from the coast of *Africa*, by which it is provided, that no loss or damage shall be recoverable on a policy on account of the mortality of slaves by natural death, or ill-treatment, or against loss by throwing overboard of slaves on any account whatsoever, &c. (*c*)

But in the case of *Lawrence* v. *Aberdein*, (*d*) where a policy was on living animals warranted "free from mortality and jettison:" and in the course of the voyage some of the animals, in consequence of the agitation of the ship in a storm, were killed; and others from the same cause, received so much injury that they died before the termination of the voyage insured: it was held that this was a loss by perils of the seas, for which the underwriters were liable. And *Bayley*, J., says, "I think that the words in this exception, will protect the underwriters in cases where the death of the animal arises from natural causes remotely produced by some of the perils insured against; but that they will not protect him where such death arises directly from any of the perils insured against."

In an action of *Rohl* v. *Parr*, (*e*) on a policy of insurance at and from *Saint Bartholomew* to the coast of *Africa* and during her stay and trade there and back to *Saint Bartholomew*, *it was attempted, under a count for a loss by perils of the sea, to recover for a total loss of the ship, which appeared to have been destroyed by a species of worms which infest the rivers of *Africa*. An intelligent merchant swore, that he had known *many instances* of this species of loss, but that the underwriters had invariably refused to pay. Lord *Kenyon*, upon this evidence, and the unanimous declaration of the jury, decided that it was not a loss by perils of the sea. (*a*)

[*277]

In an action of *Fletcher* v. *Inglis*, (*b*) on a policy of insurance on ship "at and from any port or ports, place or places, in port, at sea in government service for twelve months, warranted free from capture and seizure." The loss was averred to be by perils of the sea. At a trial before Chief Justice *Abbott*, at *Guildhall*, it appeared that the ship insured was a transport engaged in the service of government, and that in the course of such service, and within the term mentioned in the policy, she was ordered into *Boulogne;* where, under the direction of the superintendent of transports, she was moored near one of the quays. The harbour of *Boulogne* is a dry harbour, with a hard uneven bottom. Between nine and ten at night, the tide having left the vessel, a cracking noise was heard in the ship, proceeding, as the witness believed, from something breaking. Some time after this, on the return of the tide, there was a considerable swell in the harbour, and the ship struck the ground hard several times: in the morning, eighteen of the knees were found to be broken. This action was brought to recover the amount of the expense incurred by the assured in repairing the damage. The jury found a verdict for the plaintiff. Upon a motion for a new trial, it was contended for the defendant, that the *loss* did not arise from any *extraordinary accident*, and was, therefore, *not a "peril of the sea:"* and *Thompson* v. *Witmore*, (*c*) was referred to, where a transport having been hove *down upon a beach to repair, was there bilged, and it was held not to be a "peril of the sea." The Court having taken time to consider, *Abbott*, C. J., said, that the

[*278]

(*c*) 30 Geo. 3, c. 33, s. 8; 34 Geo. 3, c. 80; 39 Geo. 3, c. 80, s. 24.
(*d*) 5 B. & A. 107. (*e*) Guildhall, after Hill. 1796. Park, 142.
(*a*) And it has been held that a loss arising from rats eating holes in the bottom of a ship is not within any of the perils enumerated in the policy. Hunter v. Potts, 3 Camp. 203.
(*b*) 2 B. & A. 315. See also the case of Phillips v. Barber, 5 B. & A. 161.
(*c*) 3 Taunt. 227.

Court had considered, and they had thought it was a "*peril of the sea.*" And, therefore, the rule was refused.

Secondly, under this section we will consider the next risk mentioned in the policy, viz: "Fire," which is insured against by the underwriters in the express terms in the policy.

The first case I shall refer to on the subject is the important case of *Pelly* v. *The Governor and Company of Royal Exchange Assurance.* (*a*) This cause came before the Court on a case reserved for their opinion, after a trial and verdict for the plaintiff, at *Guildhall*, before Lord *Mansfield.* The case stated "that the plaintiff, being part-owner of the ship *Onslow*, an *East India* ship, then lying in the *Thames*, and bound on a voyage to *China*, and back again to *London*, insured it "at and from *London*, to any ports or places beyond the *Cape of Good Hope*, and back to *London*, free from average, under ten per cent. upon the body, tackle, apparel, ordnance, munition, artillery, boat, and other furniture of and in the said ship: beginning the adventure upon the said ship, from and immediately following the date of the policy, and so to continue and endure until the ship shall be arrived as above, and there anchored twenty-four hours in good safety." The perils mentioned in the policy were the common perils, viz: "of the seas, men-of-war, fire," &c. The ship arrived in the river *Canton*, in *China*, where she was to stay to clean and refit, and for other purposes. Upon her arrival there, the sails, yards, tackle, cables, rigging, apparel, and other furniture, were, by the captain's order, taken out of her, and put into a warehouse or storehouse, called a bank-saul, built for that purpose on a sand-bank, or small island, lying in the said river, near one of the banks called *Bank-saul Island*, in order to be there repaired, kept dry, and preserved, till the ship should be heeled, cleaned, and refitted. Some time after this, a fire broke out in the bank-saul, belonging to a *Swedish* *ship, and communicated itself to another bank-saul, and [*279] from thence to that belonging to the *Onslow*, and consumed the same, together with all the sails, yards, &c., belonging to the *Onslow*, that were therein. The case states further, that it was the universal and well-known usage, and has been so for a great number of years, for all *European* ships which go a *China* voyage, except *Dutch* ships, (who for some years past have been denied this privilege by the *Chinese*, and who look upon such denial as a great loss) when they arrive near this *Bank-saul Island*, in the river *Canton*, to unrig the ships, and to take out their sails, yards, tackle, cables, rigging, apparel, and other furniture; and to put them on shore in a bank-saul, built for that purpose on the said island, (in the manner that had been done by the captain of the *Onslow* on the present occasion) in order to be repaired, kept dry, and preserved, until the ships should be heeled, cleaned, and refitted. The case adds, that so doing is prudent, and for the common and general benefit of the owners of the ship, the insurers, and insured, and all persons concerned in the safety of the ship. The ship arrived from her said voyage in the *Thames*, having been again rigged, and put in the best condition the nature of the place and circumstances of affairs would permit. The question for the opinion of the Court was, whether the insurers are liable to answer for this loss, so happening upon the bank-saul, within the intent and meaning of this policy?

The Court, after a solemn argument, took time to consider the question, and then Lord *Mansfield* delivered the unanimous opinion of the Court for the plaintiff.

Lord *Mansfield.*—"By the express words of the policy, the defendants have insured the 'tackle, apparel, and other furniture of the *Onslow*,' from

---

(*a*) 1 Burr. 341, before referred to, *ante*, p, 197.

fire, during the whole of her voyage, until her return in safety to *London*, without any restriction. Her tackle, apparel, and furniture, were inevitably burnt in *China*, during her voyage, before her return to *London*. The event, then, which has happened, is a loss within the general words of the policy; and it is incumbent upon the defendant to show, from the manner in which [*280] this *misfortune happened, or from other circumstances, that it ought to be construed a peril, which they did not undertake to bear. If the chance be varied, or the voyage altered, by the fault of the owner or master of the ship, the insurer ceases to be liable; because he is only understood to engage that the thing shall be done safe from fortuitous dangers, provided due means are used by the trader to attain that end. (*a*) But the master is not in fault, if what he did was done in the usual course, and for just reasons. The insurer, in estimating the price at which he is willing to indemnify the trader against all risks, must have under his consideration the nature of the voyage to be performed, and the usual course and manner of doing it. Every thing done in the usual course must have been foreseen and in contemplation at the time he engaged; he took the risk upon a supposition that what was usual or necessary should be done. In general, what is usually done by such a ship, with such a cargo, in such a voyage, is understood to be referred to by every policy, and to make a part of it as much as if it were expressed. The usage being foreseen is rather allowed to be done, than what is left to the master's discretion, upon unforseen events; yet if the master *ex justâ causâ*, go out of the way, the insurance continues. Upon these principles it is difficult to frame a question which can arise out of this case, as stated. The only objection is, that they were burnt in a bank-saul, and not in the ship; upon land—not at sea, or upon water: and, being appertinent to the ship, losses and dangers ashore could not be included. The answer is obvious. First, the words make no such distinction: secondly, the intent makes no such distinction. Many accidents might happen at land, even to the ship. Suppose a hurricane to drive it a mile on shore; or an earthquake may have a like effect. Suppose the ship to be burnt in a dry dock; or suppose accidents to happen to the [*281] *tackle upon land, taken from the ship, while accidentally and occasionally refitting, as on account of a hole in its bottom or other mischance. These are all possible cases. But what might arise from an accidental repair of the ship is not near so strong as a certain, necessary consequence of the ordinary voyage, which the parties could not but have in their direct and immediate contemplation. Here the defendants knew that the ship must be heeled, cleaned, and refitted, in the river of *Canton:* they knew that the tackle would then be put in the bank-saul: they knew it was for the safety of the ship, and prudent that they should be put there. Had it been an accidental necessity of refitting, the master might have justified taking them out of the ship, *ex justâ causâ:* but describing the voyage is an express reference to the usual manner of making it, as much as if every circumstance was mentioned. Was the chance varied by the fault of the master? It is impossible to impute any fault to him. Is this like a deviation? No: 'tis *ex justâ causâ*, which always excuses. Had the insurers in this case been asked whether the tackle should be put in the bank-saul? they must, for their own sakes, have insisted that it should. They would have had reason to complain, if, from their not being put there, a misfortune had happened. In such a case the master would have been to blame, and by his fault would have varied the chance.

(*a*) If the underwriter insures against the barratry of the master, he would be liable for his misconduct. And see *post*, that in general the insurer is not discharged by reason of the fault or negligence of the master and mariners.

They have taken a price for standing in the plaintiff's place, as to any losses he might sustain in performing the several parts of the voyage, of which this was known and intended to be one. Therefore we are all of opinion, that in every light, and in every view of this case, in reason and justice, and within the words, intent, and meaning of this policy, and within the contemplation of the parties to the contract, the assurers are liable to answer this loss."

This case has been confirmed by Lord *Kenyon*, and the whole Court of King's Bench, in the case of *Brough* v. *Whitmore*. (*d*)

*It has been observed, that the immediate and not the remote cause of a loss is that which is looked to by the Court in construing a policy; and if this be covered by the terms expressed by the policy, the underwriters are liable, although the event may be attributable, in the first instance, to a remote cause of a different description. (*a*) [*282]

Thus in a late case of *Gordon* v. *Rimmington*, (*b*) it became a question, whether a voluntary burning of a ship, to prevent her from falling into the hands of the enemy, be a loss "by fire," within the policy? Lord *Ellenborough* said, "The case is new, but I am clearly of opinion that the plaintiff is entitled to recover. Fire is expressly mentioned in the policy, as one of the perils against which the underwriters undertake to indemnify the assured; and if the ship is lost by "fire," it is of no consequence whether this is occasioned by a common accident or by lightning, or by an act done in duty to the state. Nor can it make any difference whether the ship is thus destroyed by third persons, officers of the king, or by the captain and crew, acting with loyalty and good faith. Fire is still the *causa causans*, and the loss is covered by the policy." The plaintiff had a verdict.

So also when the immediate cause of the loss was "fire," occasioned by the negligence of the crew, it was held that the assurers were liable on a policy by which the assured were protected from "fire."

Thus in the case of *Busk* v. *Royal Exchange Assurance Company*, (*c*) which was an action of covenant upon a policy of assurance on the ship *Carolina*, "at and from *Amsterdam* to *St. Petersburg*," the policy was in the usual form, and stated among other risks which the defendants took upon themselves, "fire, barratry of the master and mariners, and all other perils, losses, and misfortunes," &c. The declaration alleged that during the voyage, the ship was consumed by fire. It appeared that the master of the *Carolina* upon *arriving at *Biorkoo Sound* on the 25th of *November*, paid off the crew, left the ship in the care of the mate, and proceeded upon business to *St. Petersburg*; the mate continued in charge of the ship till the 9th of *January* following. On that day he lighted a fire in the ship's cabin, and in the evening, without leaving any body on board, he went on board another ship lying contiguous. At twelve o'clock at night he looked out from the ship he was in, found every thing quiet, and went to bed. In the morning he was alarmed by fire. The vessel was soon consumed. It was admitted the loss arose from the negligence of the mate in lighting a fire in the cabin, and not seeing that it was properly extinguished. The jury found a verdict for the defendants. Upon a motion for a new trial, it was objected for the defendants, that as the loss was admitted to have taken place by the negligence of the mate, and as that did not by the law of *England* amount to barratry, and as the assured had protected themselves from the consequences of the fraud only, and not of the negligence of the master and mariners, he was not entitled to recover on the terms of the policy. *Bayley*, J., "The policy expressly throws upon [*283]

(*d*) 4 T. R. *ante*, p. 91.
(*b*) 1 Camp. 123.
(*a*) *Ante*, p. 268.
(*c*) 2 B. & A. 73.

the underwriters the liability for all losses proceeding from 'fire, barratry of the master and mariners, and all other perils,' &c. The object of the assured was certainly to protect himself against all risks incident to marine adventure. The underwriter being, therefore, liable *primâ facie* by the express terms of the policy, it lies upon him to discharge himself. Does he do so by shewing that the fire arose from the negligence of the master and mariners? If the ship had been wilfully set on fire, it would have been barratry, and the underwriters would be liable, but it has been argued, that the underwriters are only liable for a loss by barratry, because that is one of the risks expressly mentioned in the policy, and that the negligence of the master and mariners not being a risk expressly described in the policy, the underwriters are not liable for a loss thereby occasioned. In this case, however, the loss is occasioned by fire, against which the assured is protected by the terms of the policy; [*284] and, in our law, at least, there is no authority which says that the underwriters are not liable for a loss, the proximate cause of which is one of the enumerated risks, but the remote cause of which may be traced to the misconduct of the master and mariners. If, indeed, the negligence of the master would exonerate the underwriter from responsibility in case of a loss by fire, it would also do so in cases of loss by capture or perils of the sea: and it would, therefore, constitute a good defence in an action upon a policy, to shew that the captain had misconducted himself in the navigation of the ship, or that he had not resisted an enemy to the utmost of his power. It is certainly a strong argument against the objection now raised for the first time, that in the great variety of cases upon marine policies, which have been the subjects of litigation in Courts of Justice (the facts of which must have presented a ground for such a defence) no such point has ever been made." The learned Judge, after referring to the foreign authorities upon the subject, (*a*) proceeds thus, "We must, therefore, endeavour to collect the meaning of the contracting parties from the terms of the policy itself, and in considering whether the assured claiming for a loss by fire, is to have that claim disallowed on the ground that the fire was occasioned by the misconduct of the master and mariners: we must look to the other terms of the policy, and learn from them whether the assurers in other instances are responsible for the misconduct of the master, and when we find that they make themselves answerable for the wilful misconduct of the master; in other cases it is not too much to say, they meant to indemnify the assured against fire proceeding from the negligence of the master and mariners."

So also it was held in the case of *Walker* v. *Maitland*, (*b*) that the underwriters on a policy were liable for a loss arising from a "peril of the sea," although it was remotely owing to the neglect of the master and mariners. For the Court held, that the immediate cause of the loss was the vio- [*285] lence of the winds and the waves, and Chief Justice *Abbott* said that he was afraid of laying down any rule which would introduce an infinite number of questions as to the quantum of care which, if used, might have prevented the loss. (*c*)

So likewise in the case of *Bishop* v. *Pentland*, (*d*) where a ship was stranded within the meaning of that word in the policy, it was held that the underwriters were liable for a partial loss, although the stranding might have been occasioned remotely by the negligence of the crew in not providing a rope of sufficient strength to fasten the vessel to the shore.

(*a*) See Pothier traité du Contrat d'Assurance, s. 53. Valin, liv. 3, tit. 6, des Assurances, art. 26. 1 Emerig. p. 434. (*b*) 5 B. & A. 171.

(*c*) And see Heyman v. Parish, 2 Camp. 148, and Blyth v. Shepherd, 9 M. & W. 763.

(*d*) 7 B. & C. 219.

SECTION XI.

OF "JETTISONS."

ANOTHER risk which the underwriters take upon themselves is that of "jettison." Upon which subject the case of *Butler* v. *Wildman*, (*c*) is an authority. The circumstances of that case were these:—a captain of a *Spanish* ship, in order to prevent a quantity of dollars from falling into the hands of the enemy, by whom he was about to be attacked, threw them into the sea, and was immediately after captured: the policy was in the common form, one of the risks taken upon by the underwriters being "jettisons," expressed in the policy. There was a demurrer to the declaration. *Abbott*, C. J., after referring to the form of the declaration, said, "the question then arises whether this be a loss for which the underwriters are liable. I am of opinion that this is a loss by jettison, or if not, strictly speaking, by jettison, it is something *ejusdem generis*, and therefore falls within the general words, 'all other losses and misfortunes,'" &c. Jettison, in its largest *sense, however, signifies [*286] any throwing overboard; but in its ordinary sense it means a throwing overboard for the preservation of the ship and cargo, and most of the jurists treat of it in this sense, under the head of general average. The present case is an extraordinary species of jettison. I cannot, however, distinguish it in principle, from the case where the captain sets fire to his ship to prevent her falling into the hands of the enemy. Now it is laid down, by *Emerigon* and *Pothier*, that the underwriters are liable for such a loss; and I think, therefore, they are so in the present case." And *Bayley*, J., says, "I am of the same opinion. If the dollars had not been thrown overboard, it is clear that they would have fallen into the hands of the enemy, for the ship was, in point of fact, taken; and if the loss here stated had been declared upon as a loss by jettison, or by enemies, or within the concluding words 'all other losses and misfortunes,' the facts stated would have supported that averment. Jettison, in its largest sense, means any throwing overboard. In the passage cited from *Emerigon*, he is treating of jettison with reference to cases of general average, where jettison is used in a confined sense. But its true meaning, in a policy of insurance, seems to me to be any casting overboard *ex justâ causâ*. But assuming that this was not strictly 'jettison,' it is something '*ejusdem generis*,' and may therefore be comprehended within the words 'all other losses and misfortunes.'"

SECTION XII.

MEN-OF-WAR, ENEMIES, PIRATES, ROVERS, THIEVES, ETC.

THIS head of the risks taken upon themselves by the assurers, refers to what is generally in one single term called "capture," and is of little moment, either to the assured or assurer, during the time of peace; and, likewise, [*287] (as Mr. J. *Park* remarks in his Treatise) even in the time of *war

(*c*) 3 B. & A. 398.

the question relating to captures as between the assured and the assurer, is of very little difficulty. (*a*) Capture may be said to be, as applied to this subject, the taking of the ships or goods belonging to the subjects of one country by those of another, when in a time of war. An important observation, however, is to be made here upon the general terms used by the assurers in the policy, by which it is to be seen that they take upon themselves to indemnify the assured from the effect of all capture, and detainment and restraint of all princes, without any exception in respect to the acts of the government of their own nation. But it is now quite settled by the cases of *Bell* v. *Potts*, (*b*) and *Furtado* v. *Rogers*, (*c*) and other cases, that all insurances of enemies' property from the effects of capture by the acts of the government of the country of the underwriter, are illegal at the common law, and cannot be enforced in a Court of Justice. Lord *Alvanley*, who delivered the judgment of the Court of Common Pleas in the latter of these cases, in conclusion ends with these words, "The ground upon which we decide this case is, that when a *British* subject insures against captures, the law infers that the contract contains an exception of captures made by the government of his own country; and that if he had expressly insured against *British* capture, such a contract would be abrogated by the law of *England*."

The law relating to this question is perfectly settled in *England*, and was laid down by Lord *Mansfield* in the case of *Goss* v. *Withers*, Mich. Term, 32 Geo. 2. (*d*)

This was a special case from the Sittings in *London* upon two actions, on two distinct policies: one "on the ship," the other "upon the loading." The case states, that the ship departed from her proper port and was taken by the *French* on the 23rd *December*, 1756, and that the master, mates, and all the sailors, except an apprentice and landsman, were taken out and carried to
[*288] *France;* that the ship remained in the *hands of the enemy eight days, and was then retaken by a *British* privateer, and brought in on the 18th *January* to *Milford Haven;* and that immediate notice was given by the assured to the assurers, with an offer to abandon the ship to their care. It was also proved at the trial, that before the taking by the enemy a violent storm arose at sea, which first separated the ship from her convoy, and afterwards so far disabled her as to render her incapable of proceeding on her destined voyage without going into port to refit. It was also proved, that part of the cargo was thrown overboard in the storm, and the rest of it was spoiled whilst the ship was at *Milford Haven*, after the offer to abandon, and before she could be refitted.

Several questions arising upon the trial of the first said causes, it was agreed that the jury should bring in their verdict, in both cases, for the plaintiffs, as for a total loss, subject, however, to the opinion of the Court on the following questions, viz:—

1st. Whether this capture of the ship by the enemy was or was not such a loss as that the assurers became liable thereby?

2ndly. Whether, under the several circumstances of this case, the assured had or had not a right to abandon the ship to the assurers, after she was carried into *Milford Haven?*

This case was argued twice, viz: first, on Tuesday, 6th *June*, 1758, by Mr. *Morton* for the plaintiffs, and Mr. Serjeant *Davy* for the defendant; and again on Friday, 10th *November*, 1758, by Mr. *Norton* for the plaintiffs, and Sir *Richard Lloyd* for the defendant.

(*a*) Park Ins. 150.
(*b*) 8 T. R. 548.
(*c*) 3 B. & P. 191.
(*d*) 2 Burr. 683.

Mr. *Morton* and Mr. *Norton*, on behalf of the plaintiffs, argued for the affirmative on both questions. (*d*)

They previously distinguished between cases disputed between the assured and assurers, and those between owners and recaptors, and observed that this is a mere contract between the parties.

*First point.—This is such a total loss as renders the assurers liable to answer for it. [*289]

The counsel said they would consider, first, what an insurance is; and, secondly, what a capture by an enemy is.

1st. The definition of an insurance is in *Bynkershoek's Quæstiones publici Juris.* (*a*)

2ndly. A capture is, when there is no just ground of hope of recovering the ship, then it becomes the property of the captor—*Grotius.* (*b*)

And the period of the time of detention is another rule, viz: being twenty-four hours in *potestate hostium.* Indeed, subsequent writers do not fix it so precisely, but they are treating only upon salvage. (*c*) *Bynkershoek*, indeed, differs in the premises, (*d*) but both agree in the conclusion: for he also puts it upon the despair of the recovery of the ship; and this hope, or despair, must be a reasonable and just one, not a whimsical and arbitrary fancy, or a mere wish.

This vessel was eight days in possession of the enemy, near a month out of the power of the owners, (the assured) and almost all the hands taken out. So that by the terms and intent of the insurance, (which must be taken favourably for the assured) this must be taken to have been totally defeated to the assured, the adventure totally stopped, and, consequently, the condition broken as between the assurers and the assured.

This is a total loss; it was so long in the possession of the enemy that the "*spes recuperandi*" was gone.

Though this ship was not carried into port, nor within the enemy's fleet, yet it was eight days in the possession of the enemy, and it might have been as many months; and the *spes recuperandi* would be as absolutely gone as if it had been carried into the enemy's fleet, out of which it might possibly be immediately retaken. Therefore, the being *carried *infra præsidia* of the enemy cannot be the true rule, but the true and certain rule must, in reason, be where the "*spes recuperandi*" is gone. Indeed, the being carried *infra præsidia* may, in many cases, be an evidence of this. Now, upon the state of the present case, all hope of retaking was totally lost and gone. [*290]

However, the principle of this case is not new; for by common law the thing taken from the owner in war was gone, unless the owner makes fresh pursuit, and the property of the thing so taken in war belongs to the captor. And the common law rule is, that in a war the captor of a ship has a right to the ship and goods taken, unless the owner makes fresh pursuit, "*ante occasum solis*," 7 E. 4, 14. *Vavisour* (*a*) said, that it was adjudged in the time of that same king, "q'un q'prist tiel meason des enemies quel avoit prise devant d'un Englishe, que il averoit ceo come chose gaigne en batal, &c., et nemy le roy n l'admiral, ne le partie a qui le property fuit devant, &c., pur

(*d*) The second part is reserved for future consideration in this Treatise.

(*a*) Lib. 1, cap. 21.

(*b*) Lib. 3, cap. 6, p. 814. De jure Belli et Pacis. "Tunc enim desperari incipit recuperatio," &c.

(*c*) 29 Geo. 2, c. 34, p. 572, s. 24, (prize act.)

(*d*) Lib. 1, cap. 4. "Quæst. Juris Publici."

(*a*) Vavisour was not then judge, or even a serjeant.

ceo q' le partie ne vient freshment, meme le jour q' il fuit prise de luy, et ante occasum solis, et claime ceo." And this determination has never been shaken by any common law resolution, it has rather been confirmed and recognized.

This Court will follow the determinations of the common law, and the three acts of Parliament made in the present reign, (*b*) (which are all upon this head,) are built upon the same principles. The saving clause, (*c*) in 29 Geo. 2, c. 34, supposes the right of the owner to be extinguished and gone, and that the captor had a right to the thing taken: otherwise the Parliament had no right to impose upon the original owners such terms of payment for salvage. The act itself even calls them the former owners, and it is the bounty of the act to restore to them any part at all. No mischief can arise from this construction; many inconveniences will flow from a contrary one. The Courts of law will put liberal constructions upon policies of insurance.

[*291] *This principle was recognized in *Dean* v. *Dicker*, (*a*) which was an insurance on "goods," by the *Dursley Galley*, "interest or no interest," at and from *Jamaica* to *Bristol*. In her passage she was taken by a *Spanish* privateer, and carried into *Mores*, a port in *Spain*, kept eight days, and cut out by an *English* ship. And the plaintiff insisting that this, though "on goods," was to be considered as a wager on the bottom of the ship, brought his action as upon a total loss. The defendant insisted that, by the statutes 13 Geo. 2, c. 4, and 17 Geo. 2, c. 34, this ship is to be restored to the owners upon paying salvage: and consequently, this was only an average loss, and the plaintiff can only recover on a total loss. But Chief Justice *Lee* held, that in this the plaintiff ought to recover; for his is a wager upon a total loss in the voyage, and here has happened one: the being carried into port, and detained eight days, makes one. And where the policy is "interest or no interest," the provisions of the acts in the case of valued policies cannot take place. The act does not declare the property is not gone by such a capture, but only provides for restoring the ship to whom it did belong, and shall be proved to have belonged. He said it might be otherwise where the recapture was made before the ship was *infra præsidia*, or in the case of goods actually on board, and on a valued policy. This is a question only between the assurer and the assured; and the assurer had undertaken against all sorts of perils for premiums received. And here the voyage was totally lost, and the cargo entirely perished. So that there could be no doubt as to the real justice of the case. (*b*) Sir *Richard Lloyd* and Mr. Serjeant *Davy*, on behalf of the defendant, argued upon the same two points, but made very different deductions. First, the assurers could not be liable as for a total loss (though they agreed it was an average loss.) The capture of the ship was not a total loss. The property was not divested out of the owners: a mere capture, without being carried

[*292] *infra præsidia*, or some such other circumstance, *will not alter the property. The taking out the mariners, and putting in the enemy's crew, is not enough to do it; nor is the detaining it eight days. In the case of *Assievedo* v. *Cambridge*, the Court held this to be very plain, "that the property was not there altered by the taking." Yet in that case there was nine days' possession. (*a*) Dr. *Henchman*, in arguing for the defendant,

---

(*b*) Geo. 2. (*c*) 24 Sec.

(*a*) 2 Strange, 1250.

(*b*) The second point in this case is deferred for a subsequent consideration in this Treatise.

(*a*) The reporter here remarks in the margin, that there is no determination of the case itself in Lucas. He reports it to be adjourned for further argument. Mr. J. Foster said, that Lucas's report of that case, (of which he himself had a note) was a pretty good one. See *ante*, p. 26, where that case is referred to.

said, that the question would not have borne a dispute in the Admiralty Court, for that the law is clear "that not length of time, but the bringing *infra præsidia*, is that which divests the property;" and he cited a case of four years' possession not altering the property; and he cited a great many authorities, to prove that the property is not divested, without bringing the ship *infra præsidia*.

Bynkershoek's Quæstiones Juris Publici, lib. 1, c. 4, is contrary to *Grotius's* opinion, and says "that length of time alone is not sufficient to divest the property." (*b*)

Bynkershoek's opinion is "that there neither is, nor can any general rule be, laid down for a limit; but every case must depend upon its own circumstances."

Lord *Mansfield* here observed.—"He does say so. And he combats the opinion of *Grotius*, (supported by many other writers) that, twenty-four hours' quiet possession is the fixed rule."

There is a common law case in *March*, 110, pl. 188, "That the property is not altered, unless the ship be brought *infra præsidia* of the enemy."

The counsel for the plaintiffs, in reply, insisted,

That the totality of capture depended upon the *spes recuperandi*, and here was none. The average loss here stipulated *for is, when the voyage is performed without interruption. They do not dispute [*293] our principle of the *spes recuperandi* being the true criterion; but they say, "our ships are in constant pursuit, in seas frequented by our men-of-war and privateers." Now it is hard to conceive a pursuit without an object, or even a knowledge that a particular ship has been taken. Fresh pursuit means, the going in quest of that particular ship which is taken.

Grotius, in lib. 3, c. 6, p. 285, says, "Sed recentiori jure gentium inter Europæos populos introductum videmus, ut talia capta censeantur, ubi per horas viginti quatuor in potestate hostium fuerint."

Lord *Mansfield* observed, that a large field of argument had been entered into, and that it would be necessary to consider the law of nations; our own laws, and acts of Parliament; and also the law and custom of merchants, which make a part of our laws.

On the 23rd *November*, 1758, his Lordship delivered the resolution of the Court.

Lord *Mansfield*.—"It is not necessary to confine what shall be said to the two distinct questions that are stated. The general question is, whether the plaintiffs were, on the 18th *January*, 1757, entitled to recover against the assurers as upon a total loss, under an offer 'to abandon the ship and cargo to the assurers,' for them to make what advantage of salvage they could (for an offer 'to abandon' was then made, and nothing has happened since that time to alter the case.) There is one point which we are all of opinion is immaterial as between the assurers and the assured, viz: 'whether, by this capture, the property was, or was not, transferred to the enemy by the law of nations.' That question can happen but in two cases, namely, (1st,) between the owner and a neutral person, who has bought the capture from the enemy; and (2nd,) between the owner and recaptor."

If the ship taken by an enemy escapes from the enemy, or is retaken, or if the owner redeems (ransoms) the capture, *his property is thereby [*294] revested: which property in the ship taken was, by the law of nations, obtained by the captor.

(*b*) Lord Mansfield spoke well of Bynkershoek's writings, and recommended especially his book of Prizes, Quæstiones, "Publici Juris."

The general proposition of writers on this subject is, that "quæ ab hostibus capiuntur statim capientium fiunt," which is to be understood when "the engagement is over." Indeed, nothing can be said to be taken, till the engagement is over, and that is not over till all immediate pursuit has ceased, and all hope of recovery is gone. This is the definition of a capture, referred to by our Prize Act, 29 Geo. 2, c. 34, of a ship taken by the enemy.

And, accordingly, *Voet*, in his *Commentary upon the Pandects*, (*a*) and many authors he refers to, maintains, with great strength, "per solam occupationem dominium prædæ hostibus acquiri." One argument used to prove it is, "that the instant the captor has got possession, no friend, no fellow soldier or ally, can take it from him, because it would be a violation of his property."

But other writers and states have drawn other lines, by arbitrary rules; and partly from policy, to prevent too easy disposition to neutrals; and partly from equity, to extend the *jus postliminii* in favour of the owner. No wonder there is so great uncertainty and variety of notions amongst them, by fixing a positive boundary by the mere force of reason; where the subject-matter is arbitrary, and not the object of reason alone. Some have said from the Roman law, (which was introduced in favour of the liberty and condition of a Roman citizen taken captive) "that the prize must be brought *infra præsidia*." But what "custody *at sea* should be equal to *præsidia* at *land*," is a new fund of dispute, and leaves the matter just where it was.

The writers whom *Grotius* follows, and the many more who follow him, and some nations (*b*) have made twenty-four hours' quiet possession by the enemy the criterion. But this *Bynkershoek*, (*c*) and other writers whom he [*295] follows, and several nations, absolutely deny. Some have said the ship must be carried into the enemy's port, condemned there, sail out again, and arrive at a friend's port. All these circumstances are very arbitrary: and, therefore, this is generally exploded.

I have taken the trouble to inform myself of the practice of the Court of Admiralty in *England*, before any Act of Parliament commanded restitution, or fixed the rate of salvage: and I have talked with Sir George Lee, who has examined the books of the Court of Admiralty, and informs me, that they held the property not changed so as to bar the owner in favour of a vendee or recaptor, till there had been a sentence of condemnation: and that in the reign of King Charles the Second, Sir *Richard Floyd* gave a solemn judgment on the point, and decreed restitution of a ship retaken by a privateer, after she had been fourteen weeks in the enemy's possession, because she had not been condemned. Another case, upon the same principle, against a vendee, is cited at the end of *Assievedo* v. *Cambridge*, in 1695, (*a*) after a long possession, two sales, and several voyages.

But whatever rule ought to be followed in favour of the owner, against a recaptor or vendee, it can in no way affect the case of an insurance between the assurer and assured. Upon an action against the hundred for a robbery, a question might as well be started, "whether the property in the goods, as against the owner was changed by the sale." The ship is lost by capture; though she be never condemned at all, nor carried into any port or fleet of the enemy; and the assurer must pay the value. If, after condemnation, the owner recovers or retakes her, the insurer can be in no other condition, than if she had been recovered or retaken before condemnation. The reason is plain from the nature of the contract. The assurer runs the risk of the assured, and undertakes to indemnify: he must therefore bear the loss actually sustained,

(*a*) Lib. 49, tit. 15, vol. 2. 1155.
(*b*) Ord. of Lewis XIV.
(*c*) Quæst. Jur. Pub. lib. i, c. 4.
(*a*) Lucas (79).

and can be liable to no more. So that if after *condemnation the owner recovers the ship in her complete condition, but has paid [*296] salvage, or been at any expense in getting her back, the assurer must bear the loss so actually sustained. (*a*) The single question, therefore, upon which this case turns is, "whether the insured had, under all the circumstances upon the 18th of January, 1757, an election to abandon. The loss and disability was in its nature total, at the time it happened. During eight days the plaintiff was certainly entitled to be paid by the assurer as for a total loss: and in case of a recapture, the insurer would have stood in his place. The subsequent recapture is at best a saving only of a small part; half the value must be paid for salvage. The disability to pursue the voyage, still continued. The master and mariners were prisoners. The charter-party was dissolved. The freight (except in proportion to the goods saved) was lost. The ship was necessarily brought into an *English* port. What could be saved might not be worth the expense attending it. The subsequent title to restitution arising from the recapture, at a great expense, of the ship, disabled to pursue her voyage, cannot take away a right vested in the assured at the time of the capture. But because he cannot recover more than he has suffered, he must abandon what may be saved. The better opinion of the books says, "Sufficit semel extitisse conditionem, ad beneficium assecurati de amissione navis, etiam quod postea sequeretur recuperatio: nam per talem recuperationem non poterit præjudicari assecurato." I cannot find a single book, ancient or modern, which does not say, "that in the case of the ship being taken, the assured may demand as for a total loss, and abandon." And, what proves the proposition most strongly is that by the general law, he may abandon in the case merely of an arrest, on an embargo, by a prince not an enemy. Positive regulations in different countries have a precise time before the assured should be at liberty to abandon in that case. The fixing a precise time proves the general principle.

*No capture by the enemy, though condemned, can be so total [*297] a loss as to leave no possibility of a recovery. If the owner himself should retake at any time, he will be entitled: and, by the act of Parliament, if an English ship retakes at any time, (before condemnation or after) the owner is entitled to restitution upon stated salvage. This chance does not suspend the demand for a total loss upon the assurer, but justice is done by putting him in the place of the assured in case of a recapture. In questions upon policies, the nature of the contract as an indemnity, and nothing else, is always liberally considered. There might be circumstances in which a capture would be but a small temporary hindrance to the voyage; perhaps none at all, as if a ship was taken and in a day or two escaped entire and pursued her voyage. There are circumstances under which it would be deemed an average loss: if a ship taken is immediately ransomed by the master and pursues her voyage, there the money paid is an average loss. And in all cases the assured may choose "not to abandon."

In the second part of the "*Usages and Customs of the Sea*," (a French work translated into English) a treatise is inserted called, "*Le Guidon*," where, after mentioning the right to abandon upon a capture, he adds, "or any other such disturbance as defeats the voyage, or makes it not worth while or worth the freight to pursue it. We are, therefore, clear that the loss was total by the capture; and the right which the owner had after the voyage was defeated, "to obtain restitution of the ship and cargo, paying great salvage to the recaptor, might be abandoned to the assurers, after she was brought into *Milford Haven*." The *postea* to the plaintiff in both causes.

(*a*) See *ante*, p. 27, where Lord Mansfield's judgment is also given, and his observations on the different cases relating to the subject.

From the above full report of this case, together with the luminous observations of Lord *Mansfield*, in delivering the judgment, the reader will have gathered a considerable knowledge of the law of insurance, as applicable to the [*298] case of capture. It will be necessary to pursue the subject farther, *with the consideration of some other principles which on this subject have been settled.

In the first place, it is not lawful to insure against *British* capture, and such an insurance is void. This is settled in the cases of *Lubbock* v. *Potts*, (*a*) and *Glover* v. *Cowie*. (*b*)

Secondly, it has also been decided in the case of *Berens* v. *Rucker*, (*c*) that where a capture has been made, whether legal or not, the assurers are liable for the charges of a compromise made *bonâ fide* to prevent the ship being condemned as a prize.

It was an action on a policy of insurance on a *Dutch* ship, called the *Tyd*, and its cargo, at and from *Saint Eustatius* to *Amsterdam*, warranted a *Dutch* ship, and the goods *Dutch* property, and not laden in any *French* port in the *West Indies*. The cargo was worth 12,000*l*., and was insured at a premium of fifteen guineas *per cent*., which was advanced to this high rate on account of the number of captures made by the *English* of neutral vessels, on suspicion of illicit trade, and the detention of those vessels, by the proceedings in the Courts of Admiralty. The defendant underwrote 82*l*. of the plaintiff's, for a premium of 12*l*. 18*s*. 3*d*. In *May*, 1758, the ship was at *Saint Eustatius* taking in her cargo, which consisted of sugar and indigo, and other *French* commodities, which were put on board her, partly out of barks from sea, partly from the shore of the island. On the 18th of *June*, 1758, she sailed on her voyage; on the 27th, she was taken by an *English* privateer and carried into *Portsmouth*. On the 1st of *August*, the sailors were examined upon the standing interrogatories prescribed by the statute of 29 Geo. 2, c. 34, and the captain entered his claim in the Admiralty Court. In *October*, 1758, the claimants were cited to specify what part of the goods were taken from the shore of *Saint Eustatius*, and what from the barks. Citation was continued [*299] from Court to Court *till *February*, 1759, when an interlocutory decree was pronounced for the contumacy of the claimants in not specifying, and that therefore the goods should be presumed *French* property. There was an appeal to the Lords Commissioners of Prizes: but as many causes stood before it, as the market was very high, and as the cargo was in part perishable, the agent of the owners agreed with the captors to give them 800*l*. and costs to obtain the reversal of the sentence. The reversal was had by consent, and, in order to give costs to the captor, it was decreed by consent, that there was a sufficient cause for seizure; and thereupon costs were decreed to the captors, and restitution of the cargo to the owners was also ordered. The ship, when restored, proceeded to *Amsterdam*; and after her arrival there, the Chamber of Insurances in that city settled the average of the plaintiff towards the loss and expenses at 14*l*. 3*s*. 8*d*., occasioned by the capture, detention, and litigation; and for this sum the action was brought.

Lord *Mansfield*.—"The first question is, whether this was a just capture? Both sentences are out of the case, being done and undone by consent. The capture was certainly unjust. The pretence was, that part of this cargo was put on board off *Saint Eustatius*, out of barks supposed to come from the *French* islands, and not loaded immediately from the shore. This is now a settled point by the Lords of Appeal, to be the same thing as if they had been

---

(*a*) 7 East, 449.
(*b*) 1 M. & S. 52, and see *ante*, at the commencement of this section.
(*c*) 1 Black. 313.

landed on the *Dutch* shore, and then put on board afterwards; in which case there is no colour for seizure. The rule is, that if a neutral ship trade to a *French* colony, with all the privileges of a *French* ship, and is thus adopted and naturalized, it must be looked upon as a *French* ship, and is liable to be taken. Not so, if she have only *French* produce on board, without taking it in at a *French* port; for it may be purchased of neutrals.

"The second question is, whether the owners have acted *bonâ fide* and uprightly, as men acting for themselves, and upon a reasonable footing; so as to make the expenses of this compromise a loss to be borne by the insurers. The order of the Judge of the Admiralty to specify was illegal, contrary to the marine law and the act of Parliament, which is only [*300] declaratory of the marine law; because if they had specified, it could be of no consequence, according to the rule I before mentioned. The captors were, however, in possession of a sentence, though an unjust one: and a Court of Appeal cannot or seldom does, upon a reversal, give costs or damages, which have accrued subsequent to the original sentence; for these damages arise from the fault of the Judge, not of the parties. Under all these circumstances, therefore, the owners did wisely to offer a compromise. The cargo was worth 12,000*l.*; the appeal was hazardous; the delay certain. The *Dutch* deputy in *England* negociated the compromise; the Chamber of Commerce at *Amsterdam* ratified it, and thought it reasonable. Had the whole sentence been totally reversed, the costs must have sat heavy on the owners. I therefore think the insurers liable to answer this average loss, which was submitted to in order to avoid a total one." The jury found for the plaintiff, agreeably to the above direction. (*a*)

Thirdly: It was formerly a common practice to ransom *British* ships when taken by the enemy, by delivering to the captor what was called a ransom bill, which secured to him the price agreed upon, and operated as a bill of sale to the original owners, and as a protection to the ship against other cruisers of the enemy during the remainder of her voyage. A hostage was likewise delivered to the captor to secure him the punctual payment of the stipulated sum. Actions at common law were formerly maintained upon ransom bills. But the Court of King's Bench at length decided that such actions could not be maintained, as an alien enemy cannot sue for any right claimed to be acquired by him in actual war, *Anthon* v. *Fisher*. (*b*) But the practice of ransoming ships captured by the enemy being found to operate more to the disadvantage than the benefit of this country, it was at length prohibited [*301] altogether by act of Parliament. By 22 Geo. 3, c. 25, it is declared unlawful for any of his Majesty's subjects to ransom, or enter into any contract for ransoming any ship or vessel belonging to any of his Majesty's subjects, or any merchandises or goods on board the same, which shall be captured by the subjects of any state at war with his Majesty, or by any person committing hostilities against his Majesty's subjects. And, by the 2nd section, that all contracts and agreements entered into, and all bills, notes, and other securities, given for ransom of any such ship or goods on board the same, contrary to the act, shall be void in law, and of no effect whatever: and, by the 3rd section, a penalty of 500*l.*, with costs, is given to the informer against any person who enters into this species of contract. The same law was still further enforced by occasional acts of Parliament, passed during the war. (*a*) And it would,

---

(*a*) In Tyson v. Gurney, 3 Term Rep. 477, this case was quoted without contradiction; and the point, in support of which it was adduced, was held accordingly.

(*b*) 3 Doug. 166.

(*a*) 33 Geo. 3, c. 66; 43 Geo. 3, c. 160; 45 Geo. 3, c. 72, now expired.

therefore, follow as a necessary consequence, that no money paid on such account could be recovered from the underwriters.

Upon this principle the following decision has taken place, in the case of *Havelock* v. *Lockwood*. (*b*) The ship *Themis* was insured for twelve months, and during that period was captured and carried into *Bergen*, in *Norway*, and there condemned by the *French* consul. After this sentence, the ship was put up to public auction at *Bergen*, by the public officer of the Court of *Denmark*, having been previously advertised, and was re-purchased by the agent of the plaintiff; and for this re-purchase money the plaintiff insisted, (if not entitled to recover as for a total loss,) he was at all events entitled to a verdict.

The Court, after hearing two arguments, were unanimously of opinion that, as the sentence of the *French* consul in a neutral country, was contrary to the
[*302] law of nations, and void, *the property never was devested out of the original owner; and that, therefore, the money paid for the re-purchase was in the nature of a ransom. The ransom acts are remedial laws, and in the construction of such acts it is the rule to extend the remedy so as to meet the mischief, and the Legislature intended to prevent such a transaction as the present taking place, because it would take away the chance of re-capture. The circumstances of this being done by an agent, at an auction, and on land, were deemed immaterial, the acts of Parliament not having described at what places, or in what form a ransom is prohibited; but, having prohibited ransom in general terms, the case was thought to come within the mischiefs against which those statutes were meant to guard.

A loss is properly described to have taken place "by capture," when that is the immediate and operative cause of the loss of the thing insured. As in the case of *Green* v. *Elmslie*, (*a*) where a ship was driven, by stress of weather, upon an enemy's coast, and there captured, the loss was properly treated as a loss by capture. And in the case of *Arcangelo* v. *Thompson*, (*b*) where two causes combine together in occasioning a loss, it may be averred in the declaration to have arisen from either; as where a ship was barratrously delivered into the hands of the enemy, the loss may be alleged to have happened either by barratry or by capture. But an averment of a loss by capture cannot be sustained if the ship were not taken "*jure belli*." As in the case of *Mathie* v. *Potts*, (*c*) where goods, which were prohibited by the *Spanish* revenue laws at *Campeachy*, were put on board launches for the purpose of being smuggled
[*303] on shore, and were seized by the *Spanish* Government, the loss *was held not to be well described by an averment, that the goods were seized, captured, and taken in a forcible and hostile manner, by certain persons, enemies of our lord the king, to the plaintiffs unknown.

In charter-parties, if the vessel freighted was robbed or taken by pirates, that was held to be a loss within the meaning of the words "perils of the seas." And the same rule of construction prevails as to policies of insurance. (*a*) And Lord *Mansfield*, in *Goss* v. *Withers*, (*b*) says, "A capture by a pirate (and in *Spain*, *Venice*, and *England*, the goods go to the captor of the pirate, against the owner: as there can be no condemnation to entitle the pirate, or a capture, under a commission, where there is no war) does not change the pro-

---

(*b*) 8 T. R. 268.

(*a*) Peake, 212, *ante*, p. 270.

(*b*) 2 Camp. 620. And in the case of Blyth v. Shepherd, it was held that a count on a policy of insurance alleging a loss by "perils of the sea," and another count by "barratry" of the master, cannot be pleaded together. 9 M. & W. 763.

(*c*) 3 Bos. & Pull. 23, *ante*, p. 152.

(*a*) 2 Roll. Abr. 248, pl. 10 Comberbatch, 56.

(*b*) 2 Burr. 694.

perty. Yet, as between the assurer and assured, they are just upon the same footing as captures by an enemy."

And in the case of *Sewell* v. *The Royal Exchange Assurance Company* (*c*) it was held, "that the owners of a vessel who, by performing the stipulations of a charter-party, provoke confiscation by the illegal and piratical act of a foreign state, may recover against the assurers, declaring their loss to be by forcible seizure and capture of persons unknown."

The underwriters undertake, likewise, to bear the depredations of rovers and thieves.

In *Malyne*, (*d*) it is said, that, if there be thieves on ship-board among themselves, the master of the ship is to answer for that, and to make it good: so that the assurers are not to be charged with any such loss, for he supposes the word "thieves" to mean *assailing thieves*, for so he terms them; and their being coupled with the term "rovers" in the policy, that, as Lord *Kenyon* says in *Nesbitt* v. *Lushington*, "noscitur a sociis," it seems pretty clear that *Malyne* is right. It is also apparent that a statute of 7 Geo. 2, c. 15, gives countenance to this idea, by the preamble to which it appears that, [*304] previous to the passing of that act, the owners of the ship were liable to the proprietors of the goods for embezzlement, secreting, or making away with, of the goods, by the master or mariners, to whatever amount the value might be. (*a*)

It is not, however, a necessary consequence that, because the owner is liable in such a case, therefore the assurer must be discharged, especially as the underwriter undertakes, by the terms of the policy, to answer for the barratry of the master and mariners.

Roccus is of opinion that, when a theft is committed on board the ship, and some goods have been stolen, then the insurers are not bound, because the owner of the goods, as much as in him lies, is obliged to take care of them; and if they were stolen while in the vessel, this cannot be called an accident, but has happened through the negligence of those who did not take proper care of them. He adds, that the master or owner being liable is an additional reason, because the master of the ship is held liable for thefts committed therein: as, by receiving the goods on board, he enters into a tacit agreement to deliver them safe and whole. (*b*)

Mr. J. *Park*, in his Treatise, (*c*) (from which this is taken) says that *Roccus's* reasoning upon this subject is by no means conclusive as to *English* insurances, on account of the express terms of the contract.

The underwriter, however, is, of course, liable for a robbery of the goods from without: as thieves are a "peril" expressly insured against, *Harford* v. *Maynard*. (*d*)

II. Having considered the law of capture by the enemy, as far [*305] as it is applicable to the law of marine insurances, we will now proceed to consider the remaining part of the sentence, which is the head of the present section, and which comprises, by the express contract of the assurer,

---

(*c*) 4 Taunt. 856.

(*d*) Malyne, c. 25. Lex. Merc. Red. 4th edit. p. 295.

(*a*) By a subsequent act, 26 Geo. 3, c. 86, the owner's responsibility is limited to the value of ship and freight even in cases of external robbery, without the privity of the masters or mariners, and by the second section owners are wholly exempted from any loss occasioned by "fire." And by 53 Geo. 3, c. 159, this limitation of the responsibility of shipowners has been still further extended. Wilson v. Dickson, 2 B. & A. and Abbott on Ship. 6th edit. 349.

(*b*) Roccus de Assecur. Not. 42. (*c*) Park Ins. p. 36.

(*d*) Before Lord Mansfield at Guild. Hil. Vac. 1785. Park Ins. 36.

the risk "of all loss and damage arising to the assured by the arrests, restraints, and detainments of all kings, princes, and people, of what nation, condition, or quality whatsoever."

The words of this sentence are so large and comprehensive, that they can hardly fail to include every case which by possibility can come under the terms of it, and of the nature of the risk referred to by it.

The learned *Roccus* is of opinion, "ut si merces captæ a potestate, seu judice justitiam administrante in illo loco, aut a populo, aut ab aliâ quâcunque personâ per vim, absque pretii solutione, tenentur assecuratores solvere æstimationem dominis mercium, factâ prius per dominos mercium cessione ad beneficium assecuratorum pro recuperandis illis mercibus, vel pretio ipsorum a capientibus." (*a*)

And in another place he says, "Regis et principis factum connumeratur inter casus fortuitos: ideo si rex et princeps retineant navem oneratam frumento ex causâ penuriæ, quapropter navis non potuerit frumenta asportare ad locum destinatum, tenentur assecuratores." (*b*)

Malyne lays the law down "that assurers are liable for all losses by arrests, detainments, &c., happening both in time of war and in peace, committed by the public authority of princes." (*c*)

And Lord *Mansfield* said, in the case of *Goss* v. *Withers*, (*d*) "that the assured may abandon in case merely of an arrest or embargo by a prince, not an enemy: and, consequently, such an arrest is a loss within the meaning of the word 'detention.'"

[*306] In the case of *Nesbitt* v. *Lushington*, (*e*) the question arose *what the word "people" in this clause of the policy meant. The declaration claimed a loss of corn occasioned by the unlawful arrest, restraint, and detention of people to the plaintiffs unknown. The facts were, that the ship being forced into *Ely Harbour*, in *Ireland*, and a great scarcity of corn happening to be there at that time, the people came on board in a tumultuous manner, took the government of the vessel from the captain and crew, weighed her anchor, by which she drove upon a reef of rocks, and would not leave her, till they had compelled the captain to sell almost the whole of the corn considerably below its invoice price. The word "people," it was contended at the Bar, meant individuals of a nation as opposed to magistrates or rulers. Lord *Kenyon* says, "that which happened in this case, does not fall within the meaning of 'arrests, restraints, and detainments of kings, princes, and people.' The meaning of the word 'people' may be discovered here by the accompanying words, (*noscitur a sociis*,) it means the ruling power of the country."

Mr. Justice *Buller*.—"I cannot agree with the construction put at the Bar upon the word 'people;' it means the supreme power; the power of the country, whatever it may be. This appears clear from another part of the policy; for where the underwriters insure against the wrongful acts of individuals, they describe them by the names of 'pirates, rovers, thieves,' (*a*) then, having stated all the individual persons, against whose acts they engage, they mention other risks, 'those occasioned by the acts of kings, princes, and people, of what nation, condition, or quality whatsoever.' Those words, therefore, must apply to nations in their collective capacity."

Secondly, we will consider what is called an embargo?

An embargo is an arrest laid on ships or merchandise by public authority, or a prohibition of state commonly issued to prevent foreign ships from putting to

---

(*a*) Roc. de Assec. Not. 54.
(*b*) Ib. Not. 65.
(*c*) Malyne, 110.
(*d*) 2 Burr. 696.
(*e*) 4 T. R. 783.
(*a*) See *ante*, p. 303.

sea in time of war, and sometimes also to exclude them from entering our ports. (*b*)

*This term has also a more extensive signification, for ships are frequently detained by a prince to serve him in an expedition, and [*307] for this end have their loading taken out, without any regard to the colours they bear, or the princes to whose subjects they belong. The legality of such measures has been doubted by some, but it is certainly conformably to the law of nations, for a prince in distress to make use of whatever vessels he finds in his ports, that may contribute to the success of his enterprize. (*a*)

An embargo laid on shipping in the ports of *Great Britain*, by proclamation, in time of war is strictly legal, and will be equally binding as an act of Parliament, because a proclamation is founded on a prior law, viz:—that the king may prohibit any of his subjects from leaving the realm.

But in times of peace, the power of the king of *Great Britain* to lay such restraints is doubtful; and, therefore, where such a proclamation issued in the year 1766, against the words of the statute then in force, though absolutely necessary for the prevention of a dearth in this country, it was thought prudent to procure an act of the Legislature to indemnify those who advised, or who acted under that proclamation. (*b*)

That well informed merchant, *Magens*, says, "that in case of detention by a foreign power, which in time of peace may have seized a neutral vessel at sea, and carried it into port to be searched for an enemy's property, all the charges consequent thereon, must be borne by the underwriter; and whatever costs may arise from an improper detention must always fall upon him." (*c*)

And in the case of *Salouci* v. *Johnson*, (*d*) which was an insurance on the ship *Thetis*, a neutral ship; and upon the trial a special case was reserved for the opinion of the Court, consisting of *Willes*, *Ashurst*, and *Buller*, Justices, in the absence of Lord *Mansfield*, stating that the plaintiffs were *Tuscan* subjects, resident at *Leghorn*, sole owners of the ship **Thetis*, which [*308] sailed from *Leghorn*, and was captured by a *Spanish* ship off the coast of *Barbary*, with neutral goods on board, consigned to *London*. She was condemned as a prize in the Court of Vice Admiralty in *Spain*, which sentence was reversed; but upon another appeal to a superior Court, the latter sentence was also reversed, and the former confirmed. The grounds of condemnation were two: 1st, That the ship *Thetis* refused to be searched, and resisted with force, having fired at the *Spanish* ship. 2ndly, That she had no charter-party on board. The captain of the *Thetis* answered these two grounds: 1st, That he resisted and fired, because the *Spaniard* hailed him under false colours. 2ndly, That he had taken the goods on board by the piece, and had not freighted his ship to any individual; in which case a manifesto was sufficient without a charter-party. The sentence of the last Court of Appeal, although it condemns, admits the neutrality, for it states the vessel to be "a *Tuscan* ship." The last ground relative to the charter-party was not insisted upon. Upon the other, the three learned Judges above mentioned were of opinion, that a neutral ship is not obliged to stop to be searched; (*a*) that the captain had not been guilty of barratry; that the searcher stops a neutral ship at his peril; that this was to be considered as a case of improper detention, and consequently that the plaintiff upon this policy was entitled to recover.

(*b*) Lex. Merc. red. 4th edit. 260.
(*a*) Grot. de Jure Belli, 2, cap. 2, s. 10; 1 Black. Com. 270.
(*b*) Geo. 3, c. 7. Park Ins. 169. (*c*) 1 Magens, 67.
(*d*) B. R. Hill. 25 Geo. 3. Park Ins. 169.
(*a*) This opinion of the learned Judges does not seem to be well founded: *post*.

In the case of *Green* v. *Young*, (*b*) which was an action upon a policy of insurance: the case appeared to be, that the assurer agreed to insure the ship, from her arrival at in *Jamaica*, during her voyage to *London:* and an embargo was laid upon the ship by the government, who afterwards seized the ship, converted her into a fire-ship, and offered to pay the owners. The question was, whether this would excuse the assurers? *Holt*, C. J., seemed to think that it would not, and that this was within the words, "detention of [*309] *princes," &c., but he gave no absolute opinion, the cause having been referred to three of the jury.

Upon this case, Mr. J. *Park*, in his Treatise, (*a*) observes, "that the very general words made use of in policies go to support the idea of Lord *Holt*, and although, till lately, there was no case where this point was expressly considered, yet it seems to have been taken as settled in may cases which have come before the Court." One instance, immediately occurs in the case, which was mentioned in a previous part of this Treatise, viz: the case of *Robertson* v. *Ewer*. (*b*) There an embargo had been laid on all shipping at *Barbadoes*, and there was no doubt that the assurer was liable to any loss which might have been sustained by such detention, if the provisions and wages had been insured as well as the ship. The ship was safe, and the Court said they could only look to the subject of insurance.

In *France* it is declared, "that if any ship be stopped by our orders in any of the ports of our kingdom before the voyage begun, the assured shall not on account of this detention, abandon or cede their effects to the assurers." (*c*)

A similar regulation is to be found in *Bilboa*, namely, "that if any ship or ships insured with or without goods, shall be detained by his Majesty's order in the ports of these kingdoms of *Spain*, before the commencement of the voyage she is bound on, it shall be adjudged that no cession can be made of them, but rather the insurance ought to be held null." (*d*)

"If these ordinances," says Mr. Justice *Park*, (*e*) "when they use the words 'commencement of the voyage,' mean commencement of the risk insured, they agree with the laws of *England;* (*f*) because the underwriter can [*310] never be *answerable for anything happening before that period: but when the risk insured is 'at and from,' if the ship be detained in the loading port, by order of the state, before her departure for the voyage, but after the risk commenced, the insurer by our law is liable for the damages occasioned by such detention, as the words in the policy do in themselves import no restriction to restraints and embargoes by foreign or hostile powers only."

This question came on in the case of *Rotch* v. *Edie*, (*a*) for consideration in the Court of King's Bench; and it was unanimously decided in favour of the assured after two arguments at the Bar. But the learned Judges desired it not to be considered as deciding upon the effect of an embargo laid on by our own sovereign upon ships loading in this country. The question came before the Court upon a special case reserved for its opinion, upon the trial of an action on a policy of insurance on three ships, *Adelaide*, *Adele* and *Victor*, their stores, boats and fishing materials, &c. upon two of them at and from *L'Orient*, and upon the third, at and from and after her arrival at *L'Orient*, and on all of

---

(*b*) 2 Lord Raymond, 840; 2 Salk. 444.
(*b*) *Ante*, pp. 90, 94.
(*d*) Ib. 417.
(*a*) Park Ins. 171.
(*c*) 2 Magens, 176.
(*e*) Page 172.
(*f*) The French policies on the ship always attach only from the day the ship sails, unless the parties vary the general rule by a particular agreement. See the ordinances in 2 Magens, 168, 169. See Pothier's Traité du Contrat d'Assurance, c. 1, s. 2, art. 2.
(*a*) 6 T. R. 413.

them, "to all ports, seas and places whatsoever, beyond and on this side the capes of *Good Hope* and *Horn*, on the southern whale and seal fishery and trade, and until the ships' arrival back at *L'Orient*." The loss is stated by the declaration to have happened by the ships and their stores and provisions being, by authority of certain persons exercising the powers of government in *France*, at *Port Louis* with respect to one, and at *L'Orient* with respect to the two others, arrested and restrained from further prosecuting their voyages, and that they had thence hitherto been prevented and restrained therefrom under and by virture of such restraint. The case stated that the ship *Adelaide* sailed from the port of *L'Orient* on the voyage insured, but was obliged to put back by stress of weather into *Port Louis;* and whilst she lay there, and the ships *Adele* and *Victor* *were preparing for the voyages in the policies mentioned, and before the necessary passports and clearances could [*311] be obtained, on the 5th *February*, 1793, an embargo was laid on all vessels in those ports. That the *Adelaide* was brought back to *L'Orient*, and the perishable stores of all the three ships sold; and the said three vessels with the rest of the stores now remain at *L'Orient*, under the embargo, which has continued ever since on all ships destined on long voyages; and none have since been permitted to sail, except those in government service or upon short coasting voyages. The *Adele* and *Victor* had entered outwards upon the voyages insured, when the embargo came; and that alone prevented the ships from sailing. Notice of abandonment was given to the underwriters on the 27th *February*, 1793, and a total loss claimed; and the like notice and claim were repeated in *August*, 1793.

Lord *Kenyon*.—"I have looked into all the cases which have been cited, and I have also considered the passages collected from foreign writers, and the most respectable of them seem to me to coincide with the construction which an *English* court of justice would put upon such an instrument as the present. This plaintiff is under no disability to sue, and the defendant has entered into an engagement to indemnify him against arrests, restraints, and detainments of all kings, princes, and people, of what nation, condition, or quality soever. By this peril, the ship has been detained near three years, and the voyage is defeated; but the plaintiff is to be told this is not a loss within the policy. No common man reading the words of the policy could doubt upon the question: and it is by artificial reasoning only, collected by great reading upon foreign authors, that his claim can be repelled. But in truth, when examined, the research turns out to be all one way, and that is in favour of the plaintiff. *Roccus*, *Le Guidon*, *Green* v. *Young*, from Lord *Raymond*, are all one way: and although Lord *Holt* is said not to have given an absolute opinion, everything that fell in judgment from that great man is deserving of the highest attention. *Lord *Mansfield*, too has given an opinion upon the very point; (*a*) and when to this current of authorities we add the [*312] words of the policy itself, it is perfectly clear. Suppose war had been declared, and the ship had been detained in port as a prize, could there have been a doubt? and I can see no difference between the cases."

The other Judges delivered their opinions *seriatim*, concurring unanimously with his Lordship: and there was judgment for the plaintiff.

"In deciding the above case," says Mr. J. *Park*, at p. 174, of his Treatise, "the learned Judges expressly declined giving an opinion upon the effect of an embargo laid by the government of this country upon a ship insured here. The case of *Green* v. *Young*, above stated, was indeed an embargo by the *British* government. The very point arose, and came on for argument upon

---

(*a*) 2 Burr. 696, and *ante*.

a special case in a cause of *Bichoff* v. *Agar*.(*b*) But it not being stated whether the abandonment was made in a reasonable time, and the Court inclining to think the abandonment should be in the first instance, they sent the case back for the jury to find that fact: and upon the second trial the jury, having found that the abandonment was not made in due time, gave a general verdict for the defendant; and the main question respecting the embargo was not decided. But during the late war in *Europe*, it became necessary for the Courts to decide this question; for in *Touteng* v. *Hubbard*, (*c*) where the point arose upon a charter-party, Lord *Alvanley*, referring to the above case of *Bichoff* v. *Agar*, declared it to be the opinion of the whole Court, that a *British* merchant is not liable to answer for any damages which the owner of a foreign vessel may sustain from an embargo laid by the *British* government on foreign ships, in the nature of reprisals and partial hostility. And his Lordship goes on to declare it to be the opinion of himself and his brethren, that an insurance for

[*313] the benefit of a *foreigner, against the effects of such an embargo as that in question, which was an embargo by the *British* government upon all *Swedish* vessels, would be illegal. And a distinction was taken between such a case and that of *Green* v. *Young*, (*a*) which was a question between two *British* subjects."

And in a case of *Page* v. *Thompson*, (*b*) at Nisi Prius, before Lord *Ellenborough*, his Lordship was of opinion, where the assured was a subject of the country, he might recover against a *British* underwriter for the loss sustained by the detention of the *British* government, that being totally different from the case of a foreign assured; for amongst our own subjects, whether the plaintiff or defendant sustain the loss, it cannot prejudice the general interest of the country.

Subsequently, however, this question was decided by the Court of King's Bench, in the case of *Conway* v. *Gray*, (*c*) *upon the principle, that every man is a party to the public authoritative acts of his own government;* and on that account is as much incapacitated from making the consequences of an act of his own state the foundation of a claim to indemnity upon a *British* subject in a *British* Court of justice, as he would be if such act had been done immediately and individually by such foreign subject himself. Lord *Ellenborough*, in delivering this judgment, founded himself chiefly on the doctrine contained in the case of *Touteng* v. *Hubbard*. (*d*) After quoting that case, his Lordship said, where an embargo is laid on, it has virtually the concurrence and consent of *all* the subjects of the country, and, amongst the rest, the concurrence and consent of the assured; the assured, therefore, have joined in a resolution, that the ship shall not be allowed to sail, but shall remain in port;

[*314] and is it possible for them afterwards to make their not *sailing the foundation of an action? Where the insured and insurer are the subjects of the same state, the case will stand upon very different grounds of consideration. (*a*)

So where, in the case of *Campbell* v. *Innes*, (*b*) a policy was effected on a ship from *London* to *America*, against all risks, *American* capture or seizure included; at the trial before *Abbott*, C. J., it appeared that the ship and goods

---

(*b*) In East. Term, 1797.
(*c*) 3 Bos. & Pull. 291.
(*a*) *Ante*, 308.
(*b*) Sittings after Hil. 1804, at Guildhall. The same point was ruled by his Lordship in Visger v. Prescott, with respect to neutral property. 5 Esp. 184.
(*c*) 10 East, 536.
(*d*) 9 Bos. & Pull. 291.
(*a*) In Simeon v. Bazett, 2 M. & S. 94, it was held that the assured may recover a loss occasioned by the act of his own government, if the underwriters knew they were insuring against such acts.
(*b*) 4 B. & A. 423.

in question belonged to Messrs. *Levy* and *Gomez*, who were *American* subjects; the ship sailed on her voyage laden with *British* goods, and on her arrival in *Virginia* she was seized by the collector of the customs, and prosecuted by the government for the breach of the non-importation act. The assured abandoned to the underwriter. It appeared also, that war was declared by the *American* government before the ship sailed from *England*, but that fact was not known in *England* till after her departure. *Abbott*, C. J., was of opinion that as the ship was seized by the *American* government, on account of the war with *America*, and as the assured were *American* subjects, which circumstance was not stated on the face of the policy, and did not appear to be known to the underwriter when he subscribed the policy, the plaintiffs were not entitled to recover. Upon a motion for a new trial, *Abbott*, C. J., said, "In this case the policy did not show that the property belonged to *American* subjects, nor did it appear at the trial that the underwriter was acquainted with the fact. Now an *American* subject to whom a ship and goods are consigned in *America*, if he knows he is insured against a loss of this description, may not only omit to take proper means for preventing this loss, but may possibly facilitate it by giving information to his own government upon the subject. I think that that is a risk which the underwriter ought to know before he subscribes the policy."

If a ship sail for a port, after a notification of a blockade, within [*315] *the knowledge of the assured, or the master of the ship, the voyage would be illegal and the insurance void, and the act of sailing under such circumstances, constitutes the offence, it being an attempt to break a blockaded port. But although, by the law of nations, the blockading country may be allowed to consider its notification of a blockade as notice thereof to all the subjects of the nation to which the notification had been made, for it cannot be expected that the blockading nation should be able or required to prove actual knowledge in the master of every vessel of the other country, yet such a rule, (though even on the questions of the right of capture between the subjects of different states, it appears to be open to some qualification and relaxation for the furtherance of justice and the benefit of commerce, as, for instance, where ships have been allowed to clear out conditionally for the blockaded port on the supposition that before the arrival, a relaxation may have taken place,) (*a*) it has been held, cannot be applied with the same strictness to the contract of insurance, but that knowledge of the fact must be, in general, proved in the assured. This rule was laid down by the Court of King's Bench, in the case of *Harratt* v. *Wise*. (*b*)

It was an action on a policy of assurance on goods "at and from *Liverpool* to *Buenos Ayres*." It appeared that the vessel sailed from *Liverpool* on the 4th of *February*, 1826, and having met with bad weather, and sustained injury, put into *Lockindale*, one of the western islands of *Scotland*, on the 19th of *February*, to repair the damage, and sailed thence on the 12th of *March;* it also appeared that some of the crew having deserted at *Lockindale*, the master went to *Greenock* to procure some other men and was absent five days. The ship arrived off *Monte Video* in *May*, and was there taken by the squadron stationed for the blockade of *Buenos Ayres*, and carried into *Rio Janeiro*, where the cargo *was taken out and put into government stores. [*316] Notice of abandonment was given and refused. It was proved that the blockade of *Buenos Ayres* was notified in the *London Gazette*, on

(*a*) See the cases of the Neptunus, 2 Rob. A. R. 110, and of the Adelaide, 2 Rob. A. R. 112. (n). The Shepherdess, 5 Rob. A. R. 262.

(*b*) 9 B. & C. 712.

the 18th of *February*, and that the insurance was made on the 22nd of that month. The captain was not examined. The mate denied any knowledge by himself and, as far as he knew, by the captain, of the existing blockade, till the ship came up to the blockading squadron by night. The captain, on observing a number of ships together, dropped anchor and waited till daylight for further information, when the ship was seized. Lord *Tenterden* left it to the jury as a question of fact, whether the master was informed of the blockade before he sailed from *Lockindale*. The jury found he was not, and the plaintiff had a verdict. A rule nisi was obtained for a new trial, on the ground that the voyage being to a blockaded port was illegal, and that the notice of the blockade in the *Gazette* was notice to all the king's subjects. The judgment of the Court, after taking time to consider, was delivered by Lord *Tenterden*, C. J.—"At the trial it was contended on the behalf of the defendant, and again on motion for a new trial, that the voyage, being to a blockaded port was illegal, and the policy void. It was further contended, that as the master was at *Lockindale*, and *Greenock* after the time when the intelligence of the notification of the blockade might have arrived and must be supposed to have arrived at those places, the policy was avoided by the attempt to break the blockade. We think it cannot be said that this voyage was illegal in its commencement, because the voyage began by the ship's departure from *Liverpool*, which was before the publication of the *Gazette*. And although the blockading nation may, by the law of nations, be allowed to consider its notification of a blockade, as notice thereof to all the subjects of the nation to which the notification has been given, for it cannot be expected that the blockading nation should be able or required to prove actual knowledge in the master of every vessel of the other [*317] country, yet such a rule allowing it to *prevail to the supposed extent (though it appears probably to be open to some qualifications and relaxation for the furtherance of justice and the benefit of commerce,) cannot, in our opinion, be applied to the case of insurance. And if the possibility, or even probability of actual knowledge, should be considered as legal proof of the fact of actual knowledge, as a *presumptio juris et de jure*, the presumption might, in some cases, be contrary to the fact, and such a rule might work injustice. We, therefore, think that such a rule cannot be established as a rule of insurance law, but that knowledge, like other matters, must become a question of fact for the decision and judgment of a jury. The probability of actual knowledge, upon consideration of time, place, the opportunities of testimony, and other circumstances, may, in some instances, be so strong and cogent as to cast the proof of ignorance on the other side in the opinion of the jury, and in the absence of such proof of ignorance, to lead them to infer knowledge; but still we think the inference properly belongs to them. In the case now before the Court, if the jury had drawn the inference, we are not prepared to say they would have done wrong, neither can we say that they did wrong in declining to draw that inference; and, therefore, we cannot set aside their verdict, and the rule for a new trial must be discharged.

So in another case of *Naylor and others* v. *Taylor*, (*a*) on a policy of insurance, dated 6th of *March*, 1826, on goods, by the ship *Monarch*, "at and for *Liverpool* to any port or place in the river *Plata*, with liberty, in the event of a blockade or being ordered off the river *Plata*, to proceed to any other port, and there wait or discharge." The loss was averred to have been by capture. At the trial before Lord *Tenterden*, C. J., it appeared that the ship sailed from *Liverpool*, on the 11th of *March*, 1826, and was proceeding up the river *Plata* to *Buenos Ayres*, when she met with a *Brazilian* frigate,

(*a*) 9 B. & C. 718.

below *Monte Video*, was detained, and sent into *Monte Video*, and, after remaining there some time, was sent into *Rio de Janeiro* [*318] for adjudication. On her way there, her master and crew rescued the vessel from the persons put on board by the frigate, and brought her back to *Liverpool*. Notice of abandonment was given but not accepted. The notification of the blockade of the ports in the river *Plata*, belonging to the government of *Buenos Ayres*, by the Emperor of *Brazil*, was published in the *London Gazette* of the 18th of *February*, 1826. It was contended, on behalf of the defendant, that the voyage being to a blockaded port, after notification of the blockade, was illegal. (*a*) Lord *Tenterden* left it to the jury to say whether the master intended to violate the blockade. The jury found that they were not satisfied that the master intended to violate the blockade. And the plaintiff had a verdict, with liberty to move for a new trial in the event that the voyage was illegal.

After argument at the Bar, the judgment of the Court, which took time to consider, was delivered by Lord *Tenterden*, C. J.—"On the motion the cases of the *Neptunus*, and of the *Adelaide*, and of the *Shepherdess*, (*b*) were cited for the defendants, and it was contended that this was an illegal voyage, being to a blockaded port after the notification of the blockade. On showing cause, it was further contended, on behalf of the defendant, that admitting there was no intention to violate the blockade, the master should have waited for adjudication, and that the rescue of the ship was an act contrary to the law of nations, and discharged the policy: so that the return to *Liverpool*, instead of going to some other port to wait or discharge, according to the liberty in the policy, discharged the policy. We think there is no ground for saying, that this voyage, as insured, was illegal in its commencement; indeed, according to the opinion of Lord *Stowell*, in the case of the *Shepherdess*, (*c*) the vessel might have sailed for *Buenos Ayres*, without contravening the law of nations, [*319] provided it was a part of the original intention to inquire as to the continuance of the blockade at some port of the blockading country; and in this case inquiry might have been made at *Monte Video*, or of any of the *Brazilian* ships met in the river *Plata*, and does not indicate any intention to violate the blockade. It is unnecessary to deliver any opinion respecting the rescue, or of the return to *Liverpool*. The late cases show, that a mere loss of the adventure by retardation of the voyage, without loss of the thing insured, either by its being actually taken from the ship or spoiled, does not constitute a total loss under a policy of insurance, unless by the aid and effect of abandonment." (*a*)

The Court also held, in the above case of *Conway* v. *Gray*, (*b*) that, where a policy is made on behalf of the consignor, and the conduct of the consignor or of the state to which he belongs, has taken away from him the right of enforcing it directly and effectually for his own benefit, the consignee is not at liberty to apply it to his interest, and enforce payment, as though it had been made on his account. The Court did not mean to say that a consignee may not insure: they only meant, as Lord *Ellenborough* declared, that he was so far identified in interest and right with his consignor as not to be able to apply with effect to his own interest, which is derived from the consignor, an insurance which was made in order to cover the interest of the consignor, but which, upon the principle already stated, cannot be available for that purpose. (*c*)

(*a*) There was another point on the question of abandonment, which was referred to in the section on that subject, see *post*.

(*b*) Before referred to, p. 315.

(*c*) 5 Rob. A. R. 262.

(*a*) See as to this point, *post*.

(*b*) 10 East, 536.

(*c*) Wolff v. Horncastle, 1 B. & P. 316, *ante*, p. 4.

However, in the case of *Usparicha* v. *Noble*, (*d*) it was held that an alien enemy, in respect of his birth, domiciled in this country, might protect by insurance a shipment licensed by the Crown, to the enemy's country.

The facts of the case, in which this point was held, were, that a native *Spaniard*, domiciled in *England* in time of war between the countries, had [*320] been licensed by the king to ship *goods in a neutral vessel from *Poole* to *Bilboa* or *Santander*. The vessel, in the course of her voyage, was captured by a *French* privateer, (*France* being a co-belligerant with *Spain*, and both nations having issued similar decrees against *British* commerce) and condemned by a *French* consular court, then sitting in a port of *Spain*. The Court of King's Bench held that they could, consistently with their decision in *Conway* v. *Gray*, determine this case in favour of the assured, whether for his own benefit or of his correspondent's, though residing in the enemy's country; for the domiciled *Spaniard* was especially licensed by his Majesty, for the purpose of the very commerce which it was the object of the policy declared upon to insure.

Lord *Ellenborough* said,—"The case of *Wells* v. *Williams* (*a*) establishes that a plaintiff, an alien enemy in respect of the place of his birth, may, under similar circumstances of domicile, be allowed to sue in our Courts. The legal result of the license granted in this case is, that not only the plaintiff, the person licensed, may sue in respect of such licensed commerce in our Courts of Law, but that the commerce itself is to be regarded as legalized for all purposes of its due and effectual prosecution. To hold otherwise would be to maintain a proposition repugnant to national good faith and the honour of the Crown. The Crown may exempt any persons and any branch of commerce, in its discretion, from the disabilities and forfeitures arising out of a state of war; and its license for such purpose ought to receive the most liberal construction. To say that the plaintiff might export the goods specified in the license from *Great Britain* to an enemy's country for the benefit of himself or others, (and the license contains no restriction in this particular) and yet to hold, that where he has done so he could not insure, or having insured, could not recover his loss, either on account of his original character of a native *Spaniard*, or on account [*321] of the places to which, or of the persons to whom the goods *were destined, would be to convert the license itself into an instrument of fraud and deception. The Crown, in licensing the end, impliedly licenses all the ordinary legitimate means of attaining that end. For adequate purposes of state policy and public advantage, the Crown, it must be presumed, has been induced, in this instance, to license a description of trading with an enemy's country, which would otherwise unquestionably be illegal. Whatever commerce of this sort the Crown has thought fit to permit, (which, in respect of its prerogatives of peace and war, the Crown is by its sole authority competent to prohibit or permit) must be regarded by all the subjects of the realm, and by the Courts of Law, when any question relative to it comes before them, as legal, with all the consequences of its being legal: one of which consequences is, a right to contract with other subjects of the country for the indemnity and protection of such property in the course of its conveyance to its licensed place of destination, though an enemy's country, and for the purpose (as it probably will be in most cases) of being there delivered to an alien enemy, as consignee or purchaser." His Lordship then applied these very satisfactory principles to the case at the Bar, and then proceeded:—"For the purpose of this licensed act of trading, (but to that extent only) the person licensed is to be regarded as virtually an adopted subject of the Crown of *Great Britain:* his trading, as

(*d*) 13 East, 332.

(*a*) 1 Lord Raym. 282.

far as the disabilities arising out of a state of war are concerned, is *British* trading: and of course any argument to be drawn from a virtual participation in, and supposed privity to, the acts of his own native country, then at war with the Crown of *Great Britain*, is excluded or superseded in point of effect by an express privity to, and immediate participation in the adverse acts of the *British* government. As far as the plaintiff and the *Spanish* purchasers of this cargo are concerned, they are actually privy to the objects of the *British* Government, and acting in furtherance thereof, if in direct opposition to the laws and policy of their own country. And it will not be contended to be illegal to insure a trade carried *on in contravention of the laws of a state at war with us, and in furtherance of the policy of our country and its trade; and which this trade in question, sanctioned as it is by his Majesty's license, must be deemed to have been." (*a*) [*322]

SECTION XIII.

BARRATRY OF THE MASTER OR MARINERS.

This "risk," which the underwriters likewise take upon themselves, is thus defined by *Postlethwaite*, in his Dict. Tr. and Com. vol. 1, p. 214, where he says, "Barratry is when the master of a ship or the mariners cheat the owners or assurers, whether by running away with the ship, sinking her, deserting her, or embezzling the cargo." The owners are as much cheated and defrauded, if the vessel is run away with by the sailors, as if it is run away with by the master. But *Postlethwaite*, in vol. 1, p. 136, title "Assurance," gives a definition of barratry, which applies more immediately to the present subject. He says, "One species of barratry in a marine sense is, when the master of a ship defrauds the owners or assurers of her, by carrying her a different course to their orders."

In the case of *Vallejo* v. *Wheeler*, (*b*) it was said on the argument, that the only two cases in the common law books on barratry that are worth mentioning, are *Knight* v. *Cambridge*, (*c*) and *Stamma* v. *Brown*. (*d*) In the first of these cases it is holden, that barratry extends to every fraud of the master; and what is said at the conclusion of that case, is the best doctrine that can prevail in insurances. "The end of insuring is to be safe, at all events; and it would be very prejudicial if the Court were to be making loop-holes to get out of policies. *The assurer knows the master, and whether he can trust him; and he that insures against his running away with the ship, never imagined he might or would be guilty of any other fraud." [*323]

"The principles of the second case apply very strongly to the present, for here there was a formed design to deceive the assured; the captain did not go to *Guernsey* for the benefit of his owners, but for his own benefit only, and in going there he acted inconsistent with his duty to his owners."

Lord *Mansfield*, after the argument for a new trial in the above mentioned case of *Vallejo* v. *Wheeler*, (*a*) and after stating the case at large, delivered his

(*a*) This subject is discussed in part ii. sect. ii. on "Illegal Voyages," see *post*.
(*b*) Cowp. 153.
(*c*) Strange, 581; 1 Lord Raym. 1349, S. C.
(*d*) Strange, 1173. (*a*) Cowp. 143.

opinion as follows:—"The ground of the motion for a new trial in this case is, that under the circumstances of the case as they were given in evidence to the jury, the carrying the ship to *Guernsey* was merely a deviation, (*b*) but not barratry; and much more stress was laid at the trial than in either of the arguments, upon this particular fact, namely, that the deviation being with the knowledge of the owner (though not owner *pro hâc vice*) of the ship, it could never be barratry; the jury were, therefore, pressed to say whether it was with the consent of *Willes* or not: and they said it was. To be sure nothing is so clear, as that if the owner of a ship insures and brings an action on the policy, he can never set up as a crime a thing done by his own direction or consent. It was a material fact to proceed upon, if *Willes* had had anything to do in the case, but he had not.

"It appeared to me that the nature of barratry had not been judicially considered or defined in England with accuracy. In all mercantile transactions the great object should be certainty: and, therefore, it is of more consequence that a rule should be certain, than whether the rule is established one way or the other, because speculators in trade then know what ground to go upon. But it is not easy to collect with certainty from a general verdict, or from notes
[*324] taken at *Nisi Prius*, what was the true ground of decision; therefore in this, as in all doubtful cases, I wished a case to be made for the opinion of the Court. It appeared on the former argument and now, that there are but three common law cases relative to barratry. The first is *Knight* v. *Cambridge*, 1 *Strange*, 581; the next, *Stamma* v. *Brown*, 2 *Strange*, 1173; the last common law case is *Elton* v. *Brogden*, 2 *Strange*, 1264. In that case neither the terms of the first or second policy are stated, and yet they must have been special. The only question seems to have been, whether the capture of a second prize justified the second return of the ship to *Bristol*. The Court held that it did: if so, there could be no barratry, because the captain and mariners acted to the best of their judgment, for the benefit of the owners. Whatever excused the deviation, proved that the deviation could not be barratry.

"But these cases do not afford any precise definition of what barratry is, therefore I wished the cause to stand over to be argued by one counsel on a side. I have in the meantime considered it, and consulted with men conversant with mercantile affairs, and I am now very clear.

"The first thing to be considered is, what is meant by barratry of the master? I take the word to have been originally introduced by the *Italians*, who were the first great traders of the modern world. In the *Italian* Dictionary the word "*barratrare*" means to cheat, and whatsoever is by the master a cheat, a fraud, a cozening, or a trick, is barratry in him: nothing can be so general. Here the underwriter has insured against all barratry of the master, and we are not now in the case of an owner or freighter being privy to it: if we were, nothing is so clear as that no man can complain of an act done to which he himself is a party. In the present case, all relative to *Willes* may be laid out of it; he is originally the owner, but not the assured here. *Darwin* freighted the ship, and the goods that were on board were his; if any fraud is committed on the owner, it is committed on *Darwin*. The question
[*325] then is, what is the ground of complaint against *the master? He had agreed to go on a voyage from *London* to *Seville; Darwin* trusts he will set out immediately: instead of which the master goes on an iniquitous scheme, totally distinct from the purpose of the voyage to *Seville:* that is a cheat, and a fraud on *Darwin*, who thought he would set out directly;

(*b*) See *ante*, p. 231.

and whether the loss happened in the act of barratry, that is during the fraudulent voyage or after, is immaterial, because the voyage is equally altered, even though there is no other iniquitous intent; but in the present case, there is a great deal of reason to say, that the loss sustained was in consequence of the alteration of the voyage. The moment the ship was carried from its right course it was barratry, and the loss was immediately upon it. Suppose the ship had been lost afterwards, what would have been the case of the assured, if not secured against the barratry of the master? He would have lost his insurance by the fraud of the master, for it was clearly a deviation, and the assured cannot come upon the underwriters for a loss in consequence of a deviation. Therefore I am clearly of opinion this smuggling voyage was barratry in the master."

Aston, J.—"I wonder that there should remain a doubt at this time of day, what is meant by barratry of the master. In different ordinances different terms are used, but they all have the same meaning. In one of the ordinances of *Stockholm* it is called "knavery of the master or mariners:" and the facts stated in the present case clearly fall within that description. The ship having been freighted to *Darwin*, the jury, therefore, did right to consider *Darwin* as owner "*pro hâc vice.*" Having considered him in that light, the conduct of the master was clearly barratry. For he was acting for his own benefit, and without the consent, or privity, or any intended good to his owner. Nobody knew when the first commencement of the injury happened; but most probably, on the return of the ship to *Dartmouth* from *Guernsey*, where he had been for the purpose of smuggling. Therefore, I am clearly of opinion, that this change of the voyage for an iniquitous purpose was barratry; [*326] *which is not confined to the running away with the ship, but comprehends every species of fraud, knavery, or criminal conduct in the master, by which the owners or freighters are injured."

Willes, J. concurred.—"The only doubt in this case was, when the loss accrued. And I think it may reasonably be said to have happened in consequence of the smuggling voyage: for if the ship had proceeded on her first intended voyage she would have escaped the storm. Though this was a deviation, yet it is a just and fair rebutter to say, it was barratry in the master, which is insured against in the policy."

Ashurst, J.—"I continue of the same opinion, which I did at the trial: and I think that the plaintiffs have a right to recover on either count in the declaration, First, for the loss at sea. For it does not lie in the mouth of the assurer to object on the ground of its being a deviation, and so prevent the plaintiffs' recovering on that count: because the act of the master is a fraudulent act, and if the loss is consequential upon such fraudulent act, it is barratry against which the party is insured: and, therefore, the insurers shall not object upon a fact which is itself a forfeiture of the policy."

In the case of *Dixon* v. *Reid*, (*a*) which was an action on a policy of insurance on "ship" and "cargo," at and from *Sierra Leone* to a port of discharge in *Great Britain:* the facts were, that after the vessel set sail with her cargo of timber on board, from *Sierra Leone* on her voyage to *Europe*, she was barratrously taken out of her course by the crew, and the ship and part of the cargo sold and the remainder sent home by another vessel, and the assured abandoned to the underwriters: it was held that this was a total loss of the cargo, from the time of the committing the act of barratry. *Abbott*, C. J., observing, on the motion for a new trial, "I am of opinion that is a case of a total loss, with benefit of salvage. The case is plainly distinguishable from all

(*a*) 5 B. & A. 597.

the cases referred to in the argument, where the ships have been driven out of
[*327] *their course by the perils of the sea, and the voyage thereby retarded. In these cases the cargo was during the whole time in the possession of the assured. Here by the fraud and barratry of the master and mariners the cargo was taken out of the possession of the assured. From that time it became to them a total loss."

In another case of *Roscow* v. *Corson*, (*a*) which was an action upon a policy of insurance, whereby the cargo on board the "ship" *Newry* was insured "at and from *St. Petersburg* to *Liverpool.*" The cause was tried before C. J. *Dallas* at the *London* Sittings after Easter Term, 1818. The facts were these: the vessel set sail on her voyage, and having met with bad weather, was compelled to put into *Yarmouth* for the purpose of repair: while the repairs were proceeding the captain went to *Ireland* to visit his family and continued absent for a much longer time than was necessary to finish the repairs; and during his absence, procured forged papers. He afterwards returned to the vessel, and instead of proceeding on the voyage insured, he carried her into a foreign port. On the trial of the cause, *Dallas*, C. J. left it to the jury to consider at what time the barratry had commenced: and they having found that the barratry was in prosecution at *Yarmouth*, found a verdict for the plaintiff. Upon a motion for a new trial, *Dallas*, Chief Justice, said, "This case was tried upon facts admitted by the parties. The jury found that the barratry not only had its beginning in conception at *Yarmouth*, but also in prosecution. The cargo might have been discharged and taken on board again within a much shorter space of time. The vessel might have been ready about the 4th or 5th of *January*, but remained till the middle of *March*. The captain staid in *Ireland* until 15th *February;* the original papers were destroyed; the name of the vessel altered; her destination changed in the prosecution of the voyage; and there is no account of the loss of the time from 25th *December*, to the
[*328] middle of *March*, *during which time the captain was in *Ireland.* It has been said there is merely presumption and conjecture; but that must always be the case in matters of fraud, which are hatched in secret. I told the jury, that they had to consider, not only whether the intention was conceived at *Yarmouth*, but they should also consider the circumstance of the delay in *Ireland*, where alone the captain could have provided himself with the forged papers. The jury agreed that they could not account for this delay in any other manner than that of its arising from an act of barratry. In my opinion there is no ground for disturbing the verdict." *Park*, J., *Burrough*, J. and *Richardson*, J. concurred, and the rule was refused.

But it was held in the case of *Lockyer* v. *Offley*, (*b*) that where the master, in the course of the voyage, committed barratry by hovering and running brandy ashore in casks under sixty gallons: and that the ship then arrived in safety at her moorings in the *Thames:* and remained there in safety for twenty-seven days, when she was seized by the revenue officers for the smuggling mentioned: that about a fortnight after the seizure the assured informed the underwriters thereof, and that they would hold them liable, on the policy, it was held that the assured could not recover for the loss which had been occasioned by the act of barratry committed during the voyage, but, for which, the ship was not seized till she had anchored safely more than 'twenty-four hours' in her port of discharge. *Willes*, J. delivered the unanimous opinion of the Court after stating the case.

"The question for the consideration of the Court is, whether the plaintiffs can recover under these circumstances against the defendants: and there is no

---

(*a*) 8 Taunt. 684. (*b*) 1 T. R. 252, *ante*, p. 153.

doubt in this but that the master was guilty of barratry by smuggling on his own account without the privity of his owners.

"Many definitions of 'barratry' are to be found in the books; but perhaps this general one may comprehend almost *all the cases. 'Barratry is every species of fraud or knavery in the master of the ship by [*329] which the freighters or owners are injured;' and in this light a criminal deviation is barratry, if the deviation be without their consent.

"But the general question here is, whether, as the loss occasioned by the barratry of the master did not happen during the continuance of the voyage, the assurers are liable? I must own, this appears to me to be a novel question, and not to have been decided by any former determination. But, as in all commercial transactions the great object is certainty, it will be necessary for this Court to lay down some rule, and it is of more consequence that the rule should be certain, than whether it is established one way or the other." His Lordship then proceeded, as will be found at an earlier part of this Treatise, (*a*) and concluded by laying down the above rule "of the loss happening after the ship's being moored twenty-four hours in good safety." *Postea* to defendant.

It has been decided, that the terms "let to freight and hire" in a charter-party, are not essential, in order to constitute the freighter owner for the time, so as to make his consent, and not that of the general owner, the criterion by which the question of barratry is to be determined; it is sufficient if the contract gives the charterer the control of the vessel for the voyage in question. (*b*)

Thus in the case of *Soares and others* v. *Thornton*, (*c*) where a covenant was made by the owner with the freighter of a ship, that the ship should receive on board a specified weight of goods (not amounting to the entire quantity the ship could take in) to be carried on the voyage, with a proviso, that the owner might fill up the ship with goods at intermediate places, if the freighter should not fill it up, renders the freighter so far owner for the voyage, that if the general owner, by connivance with the master, be guilty of running the ship on shore, to defraud the freighter, this may *be alleged to [*330] be a loss by barratry, especially if the loss do not take place till after the freighter has made his election to fill up the ship with one entire cargo.

And although the general owner may not so far have divested himself of control over the ship as to have lost his right of lien for the freight, yet barratry may still be committed, if the act be done without the consent of the freighter or special owner, though the general owner be an assenting party. (*a*)

In a subsequent case of *Ross* v. *Hunter*, (*b*) which was an action on a policy on goods on board the *Live Oak*, whereof *Joseph Rati* was master, at and from *Jamaica* to *New Orleans*, it appeared that the ship was put up as a general ship at *Jamaica* in 1783; that she sailed on the voyage insured in *May*, 1783, and arrived in *June* following at the mouth of the river *Mississippi*, which leads up to *New Orleans* in *Spanish America*, at the distance of about thirty-five leagues. When the captain had got thus far he dropped anchor, and went in his boat up the river to *New Orleans*, and on his return, without carrying the ship to her port of destination, stood away for the *Havannah*, after which he was never heard of. It appeared that he had a private adventure of negroes of his own on board, which there was reasonable evidence for supposing he intended to have disposed of at *New Orleans*, but finding it difficult to do so,

---

(*a*) See *ante*, p. 154, a full report of his Lordship's judgment.
(*b*) See Christie v. Lewis, 2 Brod. & Bing. 445.
(*c*) 7 Taunt. 627.
(*a*) Saville v. Campion, 2 B. & A. 503. Tate v. Meek, 8 Taunt. 280.
(*b*) 4 T. R. 33. See the previous case of Vallejo v. Wheeler, Cowp. 143, at the commencement of this section.

on account of a prohibition to import them into the *Spanish* government, he went to the *Havannah*. The jury found for the plaintiff on the count in the declaration, charging the barratry of the master; and the whole Court of King's Bench, upon a motion for a new trial, were of opinion, that the facts stated amounted clearly to the crime of barratry.

So, also, it has been held by the Court of King's Bench, in the case of [*331] *Moss* v. *Byrom*, (*c*) that if the captain of a ship, *contrary to the instructions of his owner, cruize for and take a prize, and the vessel is afterwards lost in consequence of it, he is guilty of barratry, even though he libel his prize in the Court of Admiralty in the name of himself and his owner; and though the owner had procured a letter of marque, solely with a view to encourage seamen to enter, and without any intention of using it for the purpose of cruizing; for whatever is done by the captain to defeat or delay the performance of the voyage, is barratry in him, it being to the prejudice of his owners; and though the captain might conceive that what he did was for the benefit of his owners, yet if he acted contrary to his duty to them, it is barratry. In this case it also appeared, that the captain had boarded and plundered an *American* ship, which they afterwards released, before he cruized for and took the prize in question.

Two cases have arisen in which the doctrine of barratry was much considered: in the first of them, *Phyn* v. *Royal Exchange*, (*a*) the Court of King's Bench, after considerable argument, were unanimously of opinion, that there must be fraud to constitute barratry, and that the jury, by negativing fraud, had in truth, by that finding, negatived barratry.

But in the second of those cases, *Earle and others* v. *Rowcroft*, (*b*) the definitions of barratry, and the ingredients necessary to constitute that offence, were very elaborately argued at the Bar: and after time taken for deliberation, Lord *Ellenborough* pronounced the unanimous judgment of the Court in a very learned and luminous argument, in which his Lordship entered into a full consideration of all the prior cases.

It was an action on a policy of insurance, at and from *Liverpool* to the coast of *Africa*, during her stay and trade there, and to the port of sale in the *West Indies*, and the plaintiffs averred the loss to be *by barratry of the master*. It [*332] appeared in evidence that the master, who was also supercargo, *on his arrival off *Cape Coast Castle*, a *British* settlement on the coast of Africa, let go an anchor and began to trade for two days there; but receiving intelligence that he could barter his goods for slaves more expeditiously and advantageously at *D'Elmina*, a *Dutch* fort, about seven miles to windward, he weighed anchor and proceeded to this latter place, which had the *Dutch* flag flying and guns mounted, where he exchanged his goods, consisting, amongst other things, of muskets and gunpowder, with the *Dutch* governor, and another resident there for slaves. *Holland* was at that time at war with *Great Britain*, and he had a letter of marque on board against the *French* and *Dutch*. After taking on board a number of slaves, the captain who was then on shore at *D'Elmina*, receiving information that an *English* frigate was in sight, sent a note on board his own ship, directing her to sail immediately to *Cape Coast, to prevent mischief*, as he expressed himself; but before she reached *Cape Coast*, she was pursued and captured by the *English* frigate, and condemned for having traded with the enemy. It further appeared, that it had been usual to keep up a trading intercourse in boats and small craft, between the *English* and *Dutch* settlements on this coast, even in time of war between

(*c*) 6 T. R. 379, *ante*, p. 247.
(*b*) 8 East, 126.
(*a*) 7 T. R. 505.

the mother countries; and that the captain's object in going to *D'Elmina* was to complete his cargo as cheaply and expeditiously as he could. It was admitted that he had no particular instructions to go there, but that he was directed generally to make the best purchases with despatch. It was also proved that when the ship was about to go to *D'Elmina*, the surgeon asked the captain if there was no impropriety in going there, to which he answered that they should be soon gone, and nobody would know it; and also that besides his usual pay as captain, he had a commission on purchases and sales, which he was entitled to receive at the end of the voyage. Lord *Ellenborough* at the trial was of opinion, that this trading with the enemy by the captain, without the authority of his owners, though intended principally for their benefit, being in contravention of his duty to them, and subjecting *their property to confiscation, was barratry: but as the case was new in specie, his Lordship [*333] gave the defendant leave to move to enter a nonsuit. A motion having accordingly been made for that purpose, it was insisted by the counsel for the defendant, that the act done must be a breach of trust, and done *ex maleficio;* and that here the obvious motive of the act was to make the speediest and cheapest purchases for his employers.

After the argument, the Chief Justice said the Court would look into the cases, but added:—"I cannot refrain from making a few observations now. It has been asked, How is this act of the captain, in going to *D'Elmina*, in order to purchase the cargo for his owners more cheaply and more expeditiously, a breach of trust as between him and them? Now I conceive that the trust reposed in the captain of a vessel obliges him to obey the written instructions of his owners, where they give any; and where his instructions are silent, he is at all events to do nothing but what is consonant to the laws of the land, whether with or without a view to their advantage: because, in the absence of express orders to the contrary, obedience to the law is implied in their instructions. Therefore the master of a vessel who does an act in contravention of the laws of his country, is guilty of a breach of the implied orders of his owners. I cannot, therefore, for a moment suffer it to be supposed, that a captain is not guilty of a breach of trust to his owners who, in contravention of the law (the observance of which, nothing being expressed to the contrary, is implied in their orders) does an act which is injurious to them."

In a few days afterwards, Lord *Ellenborough* delivered the judgment of the Court:—"The question in this case is, whether a loss of a ship insured, by an illegal act of the master, not authorized by his owners, in going into *D'Elmina*, a *Dutch* and enemy's port on the coast of *Africa*, and trading there for slaves by a barter of arms and warlike stores, on account of which illegal traffic the vessel insured was seized by a king's ship, and afterwards condemned on that account *in the *West Indies*, be barratry: or [*334] whether, as was contended on the part of the defendant, in order to constitute barratry, the act should not appear to have been done with a view of promoting the master's benefit to the prejudice of his owners. It is extraordinary that this species of loss, occasioned by the misconduct of the master, selected and appointed as he is by the owners themselves, and liable to be dismissed by them only, should ever have been made the subject of insurance: and it is the more so, as it has an impolitic tendency to enable masters and owners, by a fraudulent and secret contrivance and understanding between themselves, to throw the ill success of an illegal adventure, of which the benefit, if successful, would have belonged solely to themselves, upon the underwriters. So, however, it is that this description of loss has, from the earliest times, held its place as a subject of indemnity in *British* policies of insurance.

"The original meaning of the term is to be collected from the *Italian* language, and is, according to Dufresne's *Glossary*, 'Verbum Barratria, fraus,

dolus, quit fit in contractibus et venditionibus.' (*a*) He does not apply it in any marine sense, or with reference to the particular relation of master and owners. In that sense, however, in which it is peculiarly used, as applied to subjects of *British* marine insurances, in the earliest reported case we find on the subject, it is considered as being precisely tantamount to fraud, in the particular relation which subsists between master, mariners, and owners: being such by which a loss may happen to the subject-matter insured.

"In *Knight* v. *Cambridge*, (*b*) where the breach was assigned on a loss 'per fraudem et negligentiam' of the master; and where it was objected, in arrest of judgment, that the fraud and negligence of the master were not within
[*335] the policy, being more general than the word *barratry*, *Raymond*, *J., in the same case, (*a*) held that, 'per fraudem AUT negligentiam would not have been good.' So that the negligence was considered as immaterial, and the fraud as being the substantial matter constituting the barratry. And the Court (in the report in *Strange*) held that negligence was not within the policy, but that fraud was. Now, as no limitation is put upon that term in the record in *Knight* v. *Cambridge*, we must understand the Court as holding that fraud and barratry were, in effect, words of co-extensive import: that is, that barratry included every species of fraud in the relation to the master to the owners, by which the subject matter might be endangered. The particular manner in which the loss was in that case occasioned does not appear in any of the reports of it either in *Strange*, Lord *Raymond*, or 8 *Modern*. But a MS. note of Mr. *Ford* of the argument in *Stamma* v. *Brown*, (*b*) in referring to the case of *Knight* v. *Cambridge*, and describing the question in that case upon the record, and stating that 'fraud was barratry,' adds, 'if the master sail out of port without paying port-dues, whereby the goods are forfeited, lost, or spoiled, that is barratry (*c*) (and which probably was the question of fact decided at the trial, or upon a case in the Common Pleas.) And from what is said of the facts of *Knight* v. *Cambridge*, in *Vallejo* v. *Wheeler*, (*d*) both by counsel, and by Lord *Mansfield*, it was a case in which the captain, whose duty it was to have paid the port-duties before the ship went out of port, had not done so; and is, therefore, most probably the case as is alluded to by Lord C. J. *Lee*, in *Stamma* v. *Brown*, where he compared the case then in question 'to the case of sailing out of port without paying duties,
[*336] whereby the ship *was subject to forfeiture, and which had been, he says, holden to be barratry.'

"In a MS. note of the case of *Stamma* v. *Brown*, which was read to us by my Brother *Lawrence*, Lord C. J. *Lee* defines barratry as being 'some breach of trust in the captain *ex maleficio*:' and in a note of the same case, with which I have been furnished from Mr. *Ford's* MS., Lord C. J. *Lee* says, 'barratry must be, *ex maleficio*, with intent to destroy, waste, or embezzle the goods; (that, it must be remembered, was a policy on goods) and, therefore, although this might be a deviation, yet I do not see how it can be considered as barratry. I make no question that there may be such a deviation:

(*a*) See *ante*, per Lord Mansfield, in Vallego v. Wheeler, Cowp. 154, p. 324 of this Treatise.

(*b*) 1 Str. 581. In Dixon v. Sadler, 5 M. & W. p. 409, Parke, B. says, "The rule is that a loss by 'barratry' must be so described."

(*a*) Mod. Rep. 231. "This is stated in the margin of the 2nd edit. of the 8th vol. of Mod. R. in 1760, but it is not in the 1st edit. 1730, nor the 5th edit. 1795. Note (*a*) in 8 East, p. 135.

(*b*) 2 Str. 1174.

(*c*) The same account of the case of Knight v. Cambridge is given by the counsel on both sides in the MS. argument of Stamma v. Brown, 8 East, note (*a*), (*b*), 136.

(*d*) Cowp. 153.

as where a master deviates to burn, sink, destroy, or throw the ship into the enemy's hands; or where he has benefit by the deviation, as he himself had insured the goods; and it was a material part of the case whether the master had any benefit by this alteration of the voyage, for that might have been evidence of fraud in him,' &c. Of course, he did not consider the benefit of the master as a necessary ingredient in the constitution of barratry in all cases, but only as a pregnant circumstance to prove the existence of such a fraud in point of fact, in a particular case."

In *Nutt* v. *Bourdieu*, (*a*) Lord *Mansfield* defines barratry nearly in the same terms, viz: as partaking of something criminal, and as committed against the owners by the master or mariners.

And Lord *Hardwicke*, in *Lewen* v. *Suasso*, (*b*) had before defined it to be "an act of wrong, done by the master against the ship or goods."

In *Robertson* v. *Ewer*, (*c*) *Buller*, J., upon the trial, was of opinion (and it does not appear upon the argument to have been denied by the Court) that sailing out of port without leave, in breach of an embargo, in consequence of which the *owners afterwards sustained a loss in respect of seamen's wages and provisions, by the detention of the ship, was [*337] barratry. The only question made by the Court was, whether a loss of this kind was recoverable on a policy upon 'the body of the ship.' And although it was urged in argument for the defendant that what was done by the master had been intended for the benefit of the owners, the Court did not advert to it as a point at all material to the decision of the question.

"After these various decisions of Courts of Law, we are certainly warranted in pronouncing, that a fraudulent breach of duty by the master in respect to his owners; or, in other words, a breach of duty, in respect to his owners, with a criminal intent, or *ex maleficio*, is barratry. And with respect to the owner of the ship or goods, whose interest is to be protected by the policy, it can make no difference in the reason of the thing, whether the prejudice he suffers be owing to an act of the master, induced by motives of advantage to himself, malice to the owner, or a disregard to those laws which it was the master's duty to obey, and which (or it would not be barratry) his owners relied upon his observing. It has been strongly contended, on the part of the defendant, that if the conduct of the master, although criminal in respect of the state, were, in his opinion, likely to advance his owner's interest, and intended by him to do so, it will not be barratry; but to this we cannot assent. For it is not for him to judge in cases not entrusted to his discretion, or to suppose that he is not breaking the trust reposed in him but acting meritoriously when he endeavours to advance the interest of his owners by means which the law forbids, and which his owners also must be taken to have forbidden, and not only from what ought to be, and must therefore be presumed to have been, their own sense of public duty, but also from a consideration of the risk and loss likely to follow from the use of such means. In laying down this doctrine, we feel ourselves supported by the several eminent authorities already referred to. And in giving this opinion, *we do not feel any apprehension that [*338] simple deviations will be turned into barratry to the prejudice of the underwriters; for, unless they be accompanied with fraud or crime, no case of deviation will fall within the true definition of barratry, as above laid down. Another argument was used, which hardly appears to have been used seriously; namely, that the captain, in this case, united in himself the two characters of supercargo and captain, and that, as captain, he must be considered as obeying

(*a*) 1 T. R. 323, *post*.
(*b*) Posteth. 147, tit. Assurance.
(*c*) 1 T. R. 127.

the directions of his owners, given to himself, as captain, by himself, in his character of supercargo. It is sufficient to state such an argument, to show it can have no weight. The directions of the owners as to the conduct of the voyage, and as to the places where the trade was to be carried on, are to be looked for in their instructions: which, coupled with their duty to their country, must, during every moment of the voyage, be considered as either expressly or impliedly directing the captain to conduct the ship to those places only where trade might be carried on without violating the laws of their country."

The plaintiffs, therefore, retained their verdict.

But where, in the case of *Bottomley* v. *Bovill*, (*d*) the master is called upon to exercise his own discretion, and only errs in judgment, and not "*ex malefi-cio*," it does not amount to barratry. Thus in a case in which the captain of a ship mistook the meaning of his instructions, or erred as to the best mode of carrying them into effect, it was insisted at the trial, on behalf of the assured, that the plaintiff was entitled to recover for a loss by barratry. Lord Chief Justice *Abbott* told the jury "that barratry meant an act of the master in fraud of his duty to his owner. A mere mistake of the captain as to the meaning of his instructions, or a misapprehension of the best mode of carrying them into effect, would not amount to barratry; and he directed the jury to find for the plaintiff, if they were of opinion that the captain acted in fraud of his duty to
[*339] his owner, when he went to *New Zealand* *instead of the *East Indies;* but if they thought, on the other hand, that he merely mistook the meaning of the instructions, or the best mode of acting for the purpose of carrying them into effect, then to find for the defendant." Upon this point the jury found for the defendant.

And where in *Todd* v. *Ritchie*, (*a*) which was an action on a policy, the loss was averred to be by barratry of the master; and it appeared, that the ship having sprung a leak, he took her into port, and, before any survey made, he broke up her ceiling and end-bows with crowbars, thereby injuring her, and weakening her; Lord *Ellenborough*, addressing the counsel for the plaintiff, said, "to constitute barratry, which is a crime, the captain must have been proved to have acted against his better judgment, as the case stands there is a whole ocean between you and barratry."

In the case of *Goldsmith* v. *Whitmore*, (*b*) it was held that a sentence condemning as enemy's property, a cargo which the master had barratrously carried into the enemy's blockaded port, though he may prove it to be then enemy's property, does not disprove the allegation that the cargo was lost by the captain's barratrous act.

In the case of *Vallejo* v. *Wheeler*, (*c*) it was settled, we recollect, that the freighter of the ship is to be considered as the owner of it for the particular voyage; and it seems also clearly settled by the same case, that if an act be committed with the consent of the owners of the ship, that cannot be barratry. It was, however, in a later case, insisted upon at the Bar, that an act of the captain, without the consent of the owners of the goods, who were the insured, though with the consent of the owners of the ship, was barratry, so as to charge the underwriters. But this argument was overruled by the Court; and could not have been admitted without overturning all former decisions upon the subject. Barratry implies something contrary to the duty of master and mari-
[*340] ners, in the relation in which they stand to the owners of the *ship; and although they make themselves liable to the owners of the

(*d*) 5 B. & C. 210.
(*b*) 3 Taunt. 508.
(*a*) 1 Stark. 240.
(*c*) *Ante*, p. 323.

goods for misconduct, yet not for barratry, which can be committed against the owners of the ship, and them only.

The case in which this point was settled, was *Nutt and others, Assignees, &c.* v. *Bourdieu*, (*d*) which was an action on a policy of insurance, made by *Hague* before he became a bankrupt, on goods laden in the ship *Rachette* (otherwise the *Bellona*) for a voyage from *London* to *Rochelle*, subscribed by the defendant for 120*l.* at 1*l.* 10*s.* per cent. premium. The cause was tried at *Guildhall* before Mr. Justice *Buller*, when a verdict was found for the plaintiff, subject to the opinion of the Court upon the following case: That the bankrupt shipped on board the vessel in question goods to the amount of 1,800*l.* for *Rochelle*. That the captain, by the instigation and direction of Messrs. *Le Grands*, the owners of the ship, went with the ship and cargo to *Bordeaux* instead of *Rochelle*, where the cargo was sold by the agent of *Le Grands*. That a petition was presented by the plaintiffs to the lieutenant-general of the admiralty of *Guienne*, stating the whole of the transaction between the bankrupt and the owners and captain: that in order to procure a landing at *Bordeaux*, their original destination being to *Rochelle*, false bills of lading were made out by the captain, at the instigation of *Le Grand:* the petition concluded with a prayer for relief. In consequence of this petition, a decree was passed, declaring *René Guiné* (captain) guilty of the crime of barratry of the master, for having signed false bills of lading, &c., for reparation whereof, it sentenced him to perpetual service in the gallies. It is also declared *Dominique Le Grand* guilty, and convicted of having been an instigator and accomplice of the said barratry of the master, and adjudged him to five years' servitude in the gallies: and also decreed that the said *René Guiné* and *Le Grand* should pay to the plaintiffs the amount of their loss, and all charges and *costs. The question on this case is, whether the plaintiffs were entitled to recover against the insurers? After the first argument, [*341]

Lord *Mansfield* said, "that with regard to the sentence which had been passed abroad, and which had declared the master and owner to have been guilty of barratry, it was entirely out of the question. That though it was a most righteous judgment, yet that it was no part of the consideration of the Court there, what was meant by barratry in an *English* policy. The question was left entirely open. That their idea of barratry was manifestly different from the construction put upon that word in our own Courts, for they had found the owner guilty of barratry, which was entirely repugnant to every definition of barratry, which had ever been laid down in an *English* Court of Justice.

Lord *Mansfield* delivered the opinion of the Court. (*a*)

"All questions upon mercantile transactions, but more particularly upon policies of insurance, are extremely important, and ought to be settled. The general question here is on the construction of the word barratry in a policy of insurance. It is somewhat extraordinary that it should have crept into insurances, and still more, that it should have continued in them so long; for the underwriter insures the conduct of the captain, whom he does not appoint, and cannot dismiss, to the owner, who can do either. (*b*) The point to be considered is, whether barratry, in the sense in which it is used in our policies of insurance, can be committed against any but the owners of the ship? It is clear, beyond contradiction, that it cannot; for barratry is something contrary

(*d*) 1 T. R. 323.

(*a*) The Court had declared that a second argument was unnecessary.

(*b*) See also what Lord Ellenborough says in the previous case of Earle v. Rowcroft, 8 East, p. 133, and *ante*, p. 334.

to the duty of the master and mariners, the very terms of which imply, that it must be in the relation in which they stand to the owners of the ship. The words used are master and mariners, which are very particular. An owner cannot commit barratry. *He may make himself liable by his fraudulent conduct to the owner of the goods, but not as for barratry. And, besides, barratry cannot be committed against the owner with his consent; for though the owner may become liable for a civil loss by the misbehaviour of the captain, if he consents, yet that is not barratry. Barratry must partake of something criminal, and must be committed against the owner by the master or mariners. In the case of *Vallejo* and *Wheeler*, the Court took it for granted that barratry could only be committed against the owner of the ship. The point is too clear to require any further discussion."

[*342]

The *postea* was delivered to the defendant.

It is clear, that if the owner be also the master of the ship, any act, which in another master would be construed barratry, cannot be so in him; because such doctrine would militate against one of the rules laid down in a former part of this section, namely, that no man shall be allowed to derive a benefit from his own crime, which he would do, were he to recover against the insurer for a loss occasioned by his own act. But where the person, who acts as master of the ship, is proved to have carried her out of her course for fraudulent purposes of his own, that is *primâ facie* evidence of barratry, so as to entitle the assured to recover against the underwriter, without requiring him to prove negatively that such captain was not the owner, or shewing who really was so. The fact of his being owner must be established by the underwriter, in discharge of whom it is to operate. (*a*)

This rule respecting the same person being both owner and master has been extended in the Court of Chancery to a case of *Lewen* v. *Suasso*, (*b*) where such an owner and master, after mortgaging his ship, had committed barratry; and when the mortgagee brought an action at law against the insurer to recover damages for the loss which he had sustained by this *act of barratry, the Court still considering the mortgagor as the owner, granted an injunction.

[*343]

The facts of that case were these. The plaintiff in equity having been sued at law upon a policy of insurance against the barratry of the master, which was also the loss assigned in the declaration, brought his bill in Chancery to be relieved, and for an injunction. The voyage insured was from *London* to *Marseilles*, and from thence to some port in *Holland*. The master sailed with the ship to *Marseilles*, and then, instead of pursuing his voyage, sailed to the *West Indies*, where he sold his ship, and died insolvent The plaintiff by his bill suggested, that *Matthews*, the master, was also the owner of the ship; that he had, before the voyage, entered into a bottomry bond to the defendant for 200*l.*, and afterwards, by a bill of sale, had assigned over his interest in the ship to the defendant, as a security for the 200*l.*; that *Matthews* was, nevertheless, in equity, to be considered as owner of the ship, though in law the ownership and property would be looked upon to be in the defendant; and that the owner of a ship could not, either in law or equity, be guilty of a barratry concerning the ship; and therefore he prayed an injunction, and that the policy might be delivered up. The matters of fact being confessed by the answer, an injunction was moved for on the principle, that a mortgagor is to be considered in equity as the owner of the thing mortgaged; and that *Matthews*, the master, being owner, could not be guilty of barratry.

(*a*) Ross v. Hunter, 4 T. R. 33. See *ante*, p. 330.

(*b*) In Chancery, 16, Geo. 2; Postlethw. Dict. 1 vol. 147, *ante*, p. 336.

Lord *Hardwicke*.—"Barratry is an act of wrong done by the master against the ship and goods; and this being the case of a ship, the question will be, Who is to be considered as the owner? Several cases might be put where barratry may be assigned as the breach of an insurance, and barratry or not is a question properly determinable at law: but in this case it is not so, for Courts of Law will not consider a mortgagor as having any right or interest in the thing mortgaged; and a man may frequently come into equity for relief in respect of a part only of his case. It might, indeed, be considered *at law, whether what the master has done, whether he be [*344] owner or not, did not amount to a breach of contract as master, and so to a barratry: it may likewise be so considered in this Court. But at law a defendant cannot read part of a plaintiff's answer to a bill filed against him here: the whole answer must be read, which has often been a reason for this Court to interpose by injunction upon a plaint at law; and considering the mixed nature of this case, I think an injunction ought to be granted."

And it was decided in the case of *Havelock* v. *Hancill*, (*a*) that even if the parties insert in the policy that the insurance shall be upon the ship in any lawful trade, if the captain commit barratry by smuggling, the underwriters are answerable. For otherwise the word barratry should be struck out of the policy; and most clearly the stipulation in the policy respecting the employment of the ship in a lawful trade, must mean, as was said by Lord *Kenyon* in delivering the unanimous opinion of the Court, the trade on which she is sent by the owners.

A loss by barratry is well alleged, though it be proved to have happened by the joint act of an enemy, aided by some of the crew. Indeed, it should seem, it would be good also if laid the other way; at least Lord *Ellenborough* allowed a plaintiff under similar circumstances to recover, where the loss was laid to have been by capture. (*b*)

So if a loss be alleged to have happened by the perils of the sea, it is supported by proof of the ship being wrecked, although this may have been occasioned by the barratry of the master and mariners. (*c*)

Hitherto we have considered barratry, only as it affects the rights of the insurer and insured, which is certainly the material point of view in our present inquiry: but before we come to the conclusion of this section, it will be proper to *take notice of those positive regulations, which exist in [*345] this and other countries, for the punishment of those who are guilty of some of the more heinous acts of barratry.

1. By the ordinances of *Middleburgh*, *Rotterdam*, and *Hamburgh*, if any act of barratry be committed by the master, various degrees of punishment, sometimes amounting even to death, are inflicted upon him, proportioned to the enormity of his guilt. (*a*)

2. Various enactments have at different periods, from the reign of Charles the Second, been made in this country for the punishment of masters and mariners in charge of ships, and other persons wilfully casting away, burning, or otherwise destroying such ship. (*b*)

And now by the 7 & 8 Geo. 4, c. 30, s. 10, it is enacted, "that if any person shall unlawfully and maliciously damage, otherwise than by fire, any

---

(*a*) 3 T. R. 277.

(*b*) Toulmin v. Anderson, 1 Taunt. 227. Hucks v. Thornton, 1 Holt, 38. Archangelo v. Thompson, 2 Camp. 620.

(*c*) Heyman v. Parish, 2 Camp. 148, and see *ante*, p. 285.

(*a*) 2 Mag. 77, 112, 215.

(*b*) 22 & 23 Car. 2, c. 11, s. 12; 1 Anne, stat. 2, c. 9, s. 4; 4 Geo. 1, c. 12, s. 3; 43 Geo. 3, c. 113, &c.

ship or vessel, whether in a complete or unfinished state, with intent to destroy the same, or to render the same useless, every such offender shall be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the Court, to be transported beyond the seas for the term of seven years, or to be imprisoned for any term not exceeding two years; and if a male, to be once, twice, or thrice publicly or privately whipped, (if the Court shall so think fit) in addition to such punishment. Other provisions on this subject, in this statute, were repealed by 7 Wm. 4, and 1 Vict. c. 89, by which it is enacted, "That whosoever shall unlawfully and maliciously set fire to, cast away, or in anywise destroy any ship or vessel, either with intent to murder any person, or whereby the life of any person shall be endangered, shall be guilty of felony, and being convicted shall suffer death." (*c*)

[*346] "That whosoever shall unlawfully exhibit any false light *or signal, with intent to bring any ship or vessel into danger, or shall unlawfully and maliciously do anything tending to the immediate loss or destruction of any ship or vessel in distress, shall be guilty of felony, and being convicted thereof shall suffer death. (*a*)

"That whosoever shall unlawfully and maliciously set fire to, or in anywise destroy any ship or vessel, whether the same be complete, or in an unfinished state, or shall unlawfully and maliciously set fire to, cast away, or in anywise destroy any ship or vessel, with intent thereby to prejudice any owner or part owner of such ship or vessel, or of any goods on board the same, or any person that hath underwritten, or who shall underwrite any policy of insurance upon such ship or vessel, or on the freight thereof, or upon any goods on board the same, shall be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the Court, to be transported beyond the seas for the term of the natural life of such offender, or for any term not less than fifteen years, or to be imprisoned for any term not exceeding three years." (*b*)

"That whosoever shall by force prevent or impede any person endeavouring to save his life from any ship or vessel which shall be in distress, or wrecked, stranded, or cast on shore, (whether he shall be on board, or shall have quitted the same) shall be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the Court, to be transported beyond the seas, for the term of the natural life of such offender, or for any term not less than fifteen years, or to be imprisoned for any term not exceeding three years." (*c*) "That whosoever shall unlawfully and maliciously destroy any part of any ship or vessel which shall be in distress, or wrecked, stranded, or cast ashore, or any goods, merchandise, or articles of any kind, belonging to such ship or vessel, shall be guilty of felony, and being convicted thereof, shall be liable, at the discre-

[*347] tion of the Court, to be *transported beyond the seas, for any term not exceeding fifteen years, nor less than ten years, or to be imprisoned for any term not exceeding three years." (*a*)

3. By the 11 & 12 Wm. 3, c. 7, s. 9, (made perpetual by 6 Geo. 1, c. 19) it is enacted,

"That if any commander or master of any ship, or any seaman or mariner, shall in any place, where the admiral hath jurisdiction, betray his trust and turn pirate, enemy, or rebel, and piratically and feloniously run away with his or their ship or ships, or any barge, boat, or ordnance, ammunition, goods or merchandises; or yield them up voluntarily to any pirate, or shall bring any seducing messages from any pirate, enemy, or rebel, or consult, combine, or

---

(*c*) Sect. 4.
(*b*) Sect. 6.
(*a*) Sect. 8.
(*a*) Sect. 5.
(*c*) Sect. 7.

confederate with, or attempt or endeavour to corrupt any commander, master, officer, or mariner, to yield up, or run away with any ship, goods, or merchandises, or turn pirate, or go over to pirates, or if any person shall lay violent hands on his commander, whereby to hinder him from fighting in defence of his ship and goods committed to his trust, or shall confine his master, or make, or endeavour to make a revolt in the ship, shall be adjudged, deemed, and taken to be a pirate, felon, and robber, and being convicted thereof, according to the directions of this act, shall have and suffer pains of death, loss of lands, goods, and chattles, as pirates, felons, and robbers upon the seas ought to have and suffer."

And now by the 7 Wm. 4, and 1 Vict. c. 88, s. 3, it is enacted, "That persons convicted of any offence, which by the acts referred to in that section amount to piracy, shall be liable to be transported for life, or for any term not less than fifteen years, or to be imprisoned for any term not exceeding three years." (*b*)

---

*SECTION XIV. [*348]

AND OF ALL OTHER PERILS, LOSSES, AND MISFORTUNES, THAT HAVE OR SHALL COME," ETC.

The insertion in the policy of the general words by which the underwriters undertake upon themselves "all other perils, losses, and misfortunes, that shall come to the hurt, detriment, or damage, of the ship or goods in the voyage," has the effect of providing for any doubts which might arise as to cases which come nearly, but not precisely, under the specified causes of loss. In *Cullen* v. *Butler*, (*a*) Lord *Ellenborough* says, "The extent and meaning of the general words have not yet been the immediate subject of any judicial construction in our Courts of law. As they must, however, be considered as introduced into the policy in furtherance of the objects of marine insurances, and may have the effect of extending a reasonable indemnity to many cases not distinctly covered by the special words, they are entitled to be considered as material and operative words, and to have due effect assigned to them in the construction of this instrument; and which will be done by allowing them to comprehend and cover other cases of marine damage of the like kind with those which are specially enumerated and occasioned by similar causes." *Emerigon*, (*b*) in discussing the general rule, that assurers answer for all loss and damages that happen on the sea, says, that it is to prevent doubts and vain disputes, that in the printed policies the following words have been inserted; and then he instances the general words to be found in the policies of most of the principal ports on the continent: "All inconveniences, perils, and *cas forfuits*, (which may be translated as misfortunes, accidents, &c.) *which may [*349] happen," and generally of "all perils and fortunes which may happen in what manner soever, and which can be imagined," is the provision to be found in the policies of *Bordeaux* and *Antwerp*. Thus if, as in the case

---

(*b*) And see the provisions of 16 Car. 2, c. 6, and 22 & 23 Car. 2, c. 11, as to the offence of not resisting pirates and enemies.

(*a*) 5 M. & S. 465.

(*b*) In c. 12, s. 1, p. 300, of his Traité d'Assurances.

of *Gordon* v. *Rimmington*, (*a*) a ship be burnt to prevent her falling into the hands of the enemy, and it be a doubt whether this be a loss by "fire" or by "enemies," it comes at any rate under the general term of "all other perils" expressed in the policy, and ought to be protected by them: for if it be not a loss, strictly speaking, by "enemies" or by "fire," it is a loss by a peril, "*ejusdem generis*." But these general words are to be restrained, in construction, to perils of the same kind with those more particularly mentioned in the policy.

Thus in the case of *Butler* v. *Wildman*, (*b*) which has been before mentioned, where the captain of a *Spanish* ship, in order to prevent a quantity of dollars from falling into the hands of the enemy by whom he was about to be attacked, threw them into the sea, and was immediately afterwards captured. The policy was in the common form, and declared the perils insured against to be of the "seas, men-of-war, enemies, jettisons, &c., and of all other perils, losses, and misfortunes, that had or should come to the hurt," &c: it was decided, that if this was not strictly speaking a loss by "jettison," it was at any rate something *ejusdem generis*, and therefore falls under the general words "all other losses and misfortunes," &c.

So also in another recent case of *Phillips and another* v. *Barber*, (*c*) which was an action on a policy of insurance in the usual form. For twelve months, at sea and in port, the loss averred was as follows: "that the ship having arrived in the harbour of *St. John*, in the province of *New Brunswick*, and discharged her cargo, it became necessary to place her, and she was accordingly [*350] placed, in a graving dock, there to *be repaired, and near to a certain wharf in the graving dock; and that whilst she was there, by the violence of the wind and the weather, she was thrown over on her side, whereby she struck the ground with great violence, and was bilged," &c. To this the defendant demurred specially. *Abbott*, C. J.—"I am of opinion that the plaintiff is entitled to recover. In this case he has not entangled himself with any particular allegation, but has shown fully the manner, time, and place of the loss. This, it is to be observed, was a policy upon the ship for time at sea and in port." His Lordship, after stating the facts, said, "Now I think that it is clearly alleged, that this was a loss happening in port: and then the question will be, whether it is a loss falling within any of the perils insured against. Now, the perils insured against are 'of the seas, men-of-war, &c., and of all other perils, losses, and misfortunes that have or shall come to the hurt, detriment, or damage of the said ship.' These general words are indeed restrained, in construction, to perils '*ejusdem generis*' with those specified, and to fall within the general words of the policy. There must, therefore, be judgment for the plaintiff."

The subject was very fully considered, and all the cases on it referred to, in the recent and important case of *Devaux* v. *P'Anson*. (*a*) The declaration averred that the "ship was broken, damaged, and destroyed, and rendered wholly incapable of pursuing the said voyage, by certain perils which the said assurers, by the said policy, did take upon themselves, to wit, by the accidental breaking and giving way of the tackle and supports whereby the said ship was supported, in being moved from a certain dock; in consequence of which breaking and giving way, the said ship struck violently against the sand, and was bilged, broken, destroyed, damaged, and rendered incapable of pursuing the said voyage," &c. The defendants traversed the allegation "that the ship was

---

(*a*) 1 Camp. 123, *ante*, pp. 269, 282.
(*b*) 3 B. & A. 398, *ante*, p 285, where the case is more fully stated.
(*c*) 5 B. & A. 161. (*a*) 7 Scott, 507; 5 B. N. C. 519.

broken, damaged, and destroyed, and rendered incapable of pursuing the voyage, by any perils which the said assurers *by the said policy did take upon themselves." [*351] Lord Chief Justice *Tindal*, after referring to the other parts of the case, said, "The point remaining to be considered is, whether the loss was occasioned by any of the perils insured against by the policy. It is to be observed that the words in the policy are very large: the policy not only enumerates 'perils of the sea,' but all other perils, losses, and misfortunes that had or should come to the hurt, detriment, or damage of the subject-matter of the insurance; and the cases cited by the plaintiff of *Carruthers* v. *Sydebotham*, (*a*) *Fletcher* v. *Inglis*, (*b*) and *Phillips* v. *Barber*, (*c*) are sufficient to shew, that a loss occasioned by the endeavour to get the vessel afloat from the dock in which she has just been repaired, was a loss within the policy. Indeed, the difficulty which has arisen upon this point in former cases, has rather turned upon the question whether such a loss was properly described in the declaration as a loss by the perils of the sea, than to any doubt as to its falling within the general terms of the policy; and in the present case that difficulty is avoided by the mode in which the loss is described in the declaration."

It may properly enough be mentioned under this head, that if a ship has been missing, and no intelligence received of her within a reasonable time after she sailed, it shall be presumed that she has foundered at sea.

And in the case of *Green* v. *Brown*, (*d*) the ship *Charming Peggy* was insured in 1739, from *North Carolina* to *London*, with a warranty against captures and seizures, and in an action the loss was laid in the declaration to be by sinking at sea. All the evidence given was, that she sailed out of port on her intended voyage, and had never since been heard of. Several witnesses proved, that in such a case the presumption is, that she perished at sea, all other sorts of losses being generally heard of. It was insisted for the defendant, that as captures and seizures were excepted, it lay upon the plaintiff *to prove, that the loss happened in the particular manner [*352] declared on. But Lord Chief Justice *Lee* said, "it would be unreasonable to expect certain evidence of such a loss, where every body on board is presumed to be drowned: and all that can be required is the best proof the nature of the case admits of, which the plaintiff has given." He therefore left it to the jury, who found according to the plaintiff's declaration.

The same doctrine was held in a more modern case of *Newby* v. *Read*, (*a*) before Lord *Mansfield*. It was an action of covenant on a deed, in the nature of a policy of insurance, by which the defendant was bound to insure against any loss happening before the 30th of *November*, 1762, free from average. The ship sailed from *Newcastle* to *Copenhagen*, which is usually about ten days' voyage. She was soon after taken by a *French* privateer, but ransomed; and she then proceeded on her voyage to *Copenhagen* (as was proved by the ransomers) in a bad condition. She was never heard of afterwards, though all due diligence had been used; and several ships, which sailed after her, were proved to have arrived safe at *Copenhagen*.

Lord *Mansfield* told the jury, that this evidence was a sufficient ground to presume that she perished at sea, unless the contrary appeared. The jury accordingly found for the plaintiffs.

So in a recent case of *Koster* v. *Reid*, (*b*) on a policy on goods by a certain ship, it was proved that she sailed on the voyage insured with the goods on

---

(*a*) 4 M. & S. 77.
(*b*) 2 B. & A. 315.
(*c*) 5 B. & A. 161.
(*d*) 2 Str. 1199.
(*a*) Sittings after Michaelmas, 3 Geo. 3. Park Ins. p. 148.
(*b*) 6 B. & C. 19.

board, and never arrived at her port of destination, and that a few days after her departure a report was heard at the place whence she sailed that she had foundered at sea, but that the crew were saved. The Court of King's Bench held that this was a sufficient *primâ facie* proof of a loss by the perils of the sea, and that the plaintiff was not bound to call any of the crew, or to shew that he was unable to procure their attendance.

[*353] *The late Mr. J. *Park*, in his Treatise, remarks, (*a*) that he has not been able to find any regulation in the law of *England*, or the usage of merchants, fixing a limited time, within which the assured may demand payment for his loss, in case no accounts arrive of the ship upon which insurance is made. Indeed, from the nature of the thing, what shall be a reasonable time in such cases, must always depend upon a variety of obvious circumstances. He says "he understands, however, a practice has prevailed among insurers, which seems reasonable enough, that a ship shall be deemed lost if not heard of in six months after her departure (or after the time of the last intelligence from her) for any part of *Europe*, and in twelve months if for a greater distance. The only objection to such a practice is, that the latter period does not seem sufficient in *India* voyages. However, that is a matter for the insurer's consideration; and even if he should pay the money under a mistake, supposing the ship lost when it really is not, he might, as we shall see hereafter, if the insured were unwilling to refund, recover it back, in an action for money had and received to his use."

In *Spain* and *France*, this matter, however, is not left to uncertainty; but the time, within which such losses may be demanded, is fixed and ascertained by express regulations. By the ordinances of the former, if any ship insured on going to, or coming from the *Indies*, is not heard of in a year and a half after her departure from the port where she loaded, it is declared that she is, and shall be deemed lost, (*b*) by those of the latter it is said, that if the insured receive no news of his ship, he may, at the expiration of a year for common voyages, reckoning from the day of the departure, and after two years for those at a greater distance, make his cession to the underwriters, and demand payment, without being obliged to produce any certificate of the loss. (*c*)

[*354] *SECTION XV.

TOTAL LOSSES AND ABANDONMENT.

"And in case of any loss or misfortune, it shall be lawful, &c."

The part of the policy at which we are now arrived, is that in which, under the terms introduced by it, viz:—"any loss" or "misfortune," we necessarily have brought under our consideration, in the first place, the most important distinction of the different descriptions of losses, both with regard to their character, their amount, and the effect which they have respectively, at the time of their happening, upon the contract between the assured and the assurers. The principal distinction which we shall find it will be necessary to draw between these losses, mentioned in the policy, is that which makes the essential differ-

---

(*a*) Park Ins. p. 149. (*b*) 2 Magens, 33.

(*c*) 2 Magens, 177; Ord. of Lewis, XIV., s. 31, art. 58. See also in the judgment of Lord Abinger, Roux v. Salvador, 4 Scott, p. 29, the rules mentioned by Straccha, of the "Rota of Genoa" on this point, *post*, p. 362.

ence between a total, and what is termed an average loss: keeping in mind that the "average" here mentioned has nothing to do with "general average." We see from the remaining words of this sentence, "that in case of any loss or misfortune it shall be lawful for the assured, their factors, servants and assigns to sue, labor, and travel for, in and about the defence, safeguard, and recovery of the said goods and merchandises, and ship, &c., or any part thereof, without prejudice to this insurance, to the charges whereof we the assurers will contribute, each one according to the rate of quantity of his sum herein assured." We shall, according to this clause of the policy, have occasion to consider in what cases the assured can with advantage, and ought for the benefit of all to exert themselves, through their master or agents, on any loss that may arise during the voyage insured; and in what cases it is allowed to the assured by law, and by the usage and custom of merchants, to abandon the adventure and the property insured into the hands of the *underwriters, who have taken upon themselves the responsibility of saving the assured [*355] harmless from those perils and risks specified in the policy, and subscribed by them. I have stated that the main distinction between the character and the amount of the losses is usually drawn, between what are total losses, and such as are only in their nature average losses. It shall be our present object to discuss the law and practice on each of these descriptions of losses in their turn, and first, we will consider the law relating to total losses; this will also include the question of the law of abandonment.

The real character and nature between an average and a total loss on goods, and the doctrine and nature of abandonment have undergone lately so thorough an examination and sifting, in a case which was a writ of error, upon a judgment of the Court of Common Pleas; and the subject which is now about to claim our attention, is so ably handled by Lord *Abinger*, who delivered the judgment of the Court of Error, that I think we shall more readily understand the principles laid down in the earlier cases on this subject, when we have had the benefit of the light which has been cast upon the subject in this important judgment. The facts of the case, in order to render the doctrine and the principles laid down upon this subject intelligible, will sufficiently appear from the judgment as now delivered by Lord *Abinger*, C. B. "This was a writ of error, upon a judgment of the Court of Common Pleas, in a case of *Roux* v. *Salvador*, (*a*) in an action on a policy of insurance, upon 'goods by the *Roxalane*, at and from any ports or places in *South America*, to a port in *France*, or the *United Kingdom*,' with various liberties not material to be mentioned."

By a memorandum written at the foot of the policy, the insurance was declared to be on hides, "shipped at *Valparaiso*," free of average unless the ship were stranded; and in case of average loss, the underwriters were to pay the expense of washing and drying in full. The declaration *contains the usual averments, and states that the hides were shipped [*356] at *Valparaiso;* that the vessel set sail with them on board for *Bordeaux*, a port in *France*, and that in the course of the voyage the hides became lost by the perils of the sea, and never arrived at *Bordeaux*. The plea is the general issue.

It appears by the record, that the cause was tried, and a special verdict found, which, after stating the facts necessary to support those parts of the declaration upon which no question arises, sets forth the loss in substance as follows:—that the hides of the value of 1,000*l.* having been shipped in the vessel, she set sail on her voyage; in the progress of which she encountered

(*a*) 1 Scott, 491; 1 B. N. C. 536.

perils of the sea and sprung a leak, in consequence of which she was compelled to put into *Rio de Janeiro*, being the nearest port; that her cargo was taken out, and landed, when it was found, as the fact was, that the hides were damaged by the perils of the sea; that by reason of their being wetted by the water issuing through the leak, and of the consequent dampness of the hold, they were undergoing a process of fermentation which could not be checked; that in consequence of their progressive putrefaction, it was impossible to carry them, or any part of them, in a saleable state, to the termination of the voyage; and that if it had been attempted to take them to *Bordeaux*, they would, by reason of the putrefaction, have lost the character of hides before their arrival. The special verdict further states, that the hides were in consequence sold at *Rio de Janeiro*, by order of the *French* consul there, for the sum of 270*l.*; that they were purchased to be tanned, and were afterwards tanned. The judgment is entered up for the defendant: to set aside which, this writ of error is brought. It appears, from the report of the judgment of the Court of Common Pleas upon this case, that the learned Judges were of opinion, that there was a constructive loss in this case, if it had been followed by an abandonment to the underwriters, and that their judgment for the defendant was founded upon [*357] the want of such abandonment. It has been urged before *us in support of the judgment, first, that there was no total loss: secondly, that if there were any circumstances which might make the loss amount to more than an average loss, they were not such as, without an abandonment, could have been converted into a total loss.

The interest which the assured may have in certain cases to convert an average loss into a total loss, may be fair argument to a jury, upon a doubtful question of fact as to the nature of the loss, or the motive of abandonment; and in the same view that interest has been adverted to by Judges, where the conclusions to be drawn from facts upon a special case, or upon a motion for a new trial, were open to discussion. But is neither authority nor principle for the distinction in point of law: whether a loss be total or average in its nature, must depend upon general principles. The memorandum does not vary the rules upon which a loss shall be average or total; it does no more than preclude the indemnity for an ascertained average loss, except on certain conditions. It has no application whatever to a total loss, or to the principles on which a total loss is to be ascertained.

Dismissing this distinction, then, the argument rests upon the position, that if at the termination of the risk, the goods remain in specie, however damaged, there is not a total loss. Now, this position may be just, if by the "termination of the risk," is meant the arrival of the goods at their place of destination according to the terms of the policy. But there is a fallacy in applying those words to the termination of the adventure, before that period, by a peril of the sea. The object of the policy is to obtain an indemnity for any loss the assured may sustain by the goods being prevented by the perils of the seas from arriving in safety at their place of destination. If, by reason of the perils insured against, the goods do not so arrive, the risk may in one sense be said to have terminated at the moment when the goods are finally separated from the vessel. Whether, upon such an event, the loss is total or average, no doubt, depends upon circumstances. But the existence of the goods, or any [*358] part of *them, in specie, is neither a conclusive, nor in many cases a material circumstance to that question. If the goods are of an imperishable nature, if the assured become possessed of or can have the control of them, if they still have an opportunity of sending them to their destination, the mere retardation of their arrival at their original port may be of no prejudice to them, beyond the expense of reshipment in another vessel. In such a case, the loss can be but an average loss, and must be so deemed,

even though the assured for some real or supposed advantage to themselves, elect to sell the goods where they have been landed, instead of taking measures to transmit them to their original destination. But if the goods, once damaged by the perils of the sea, and necessarily landed before the termination of the voyage, are, by reason of that damage in such a state, though the species be not utterly destroyed, that they cannot with safety be reshipped into the same or any other vessel; if that before the termination of the original voyage the species itself would disappear, and the goods assume a new form, losing all their original character; if though imperishable, they are in the hands of strangers, not under the control of the assured; if by any circumstance over which he has no control, they can never, or within no assignable period, be brought to their original destination; in any of these cases, the circumstance of their existing in specie at that forced determination of the risk is of no importance. The loss is, in its nature, total to him who has no means of recovering his goods, whether his inability arises from their annihilation, or from any other insuperable obstacle. Accordingly, in the case of *Hunt* v. *Royal Exchange Assurance*, (*d*) the judgment of Lord *Ellenborough* contains a very important passage, which distinguishes it from the present case. He says, "If, indeed, the cargo had been of a perishable nature, this would not have been a case of retardation only, but destruction of the thing assured." And further, he says, "I cannot necessarily *infer that the flour would be changed in quality and condition by the delay, from November [*359] to April, so to incur any material damage operating a destruction of the thing insured."

In the case of *Anderson* v. *Wallis*, (*a*) which has also been relied on, the goods consisted of copper, which was wholly uninjured, and of iron, which was partially damaged; the assured by their own agent had possession of them; the ship was capable of repair, and might have prosecuted the voyage, and did, in four weeks after the accident sail upon another voyage; the only pretence for a total loss was the retardation of the voyage; upon which ground, combined with other circumstances, the Court held the loss not to be total. But it is clear, from the judgment of the Court, that if by reasons of the perils of the sea, the goods could never have been sent to their destination, the loss would have been held to be total. In like manner, it will be found in the other cases cited upon this part of the argument, that there has always existed one or more other circumstances in combination with that of the goods existing in specie, to induce the judgment that the loss was not total: as in *Glennie* v. *Royal Exchange Assurance Company*, (*b*) the rice had arrived at its port of destination, and though damaged, was delivered to the consignees, and in a saleable state as rice.

In *Thompson* v. *Royal Exchange Assurance Company*, (*c*) the tobacco and sugar, though damaged by the perils of the sea, were in the hands of the owner at *Heligoland;* and, as stated by Lord *Ellenborough* in his judgment, might for anything that appeared, have been forwarded to their port of destination.

In *Anderson* v. *Royal Exchange Assurance Company*, (*d*) the wheat was partly saved, was in the hands of the shipper at *Waterford*, was kilndried, and might have been forwarded, as the rest of the cargo was after the same operation, to its port of destination; but the owner, after dealing with it as *some time as is own, abandoned it too late, even if he had a right [*360] to abandon it all.

(*d*) 5 M. & S. 47.
(*b*) 2 M. & S. 371.
(*d*) 7 East, 38.
(*a*) 2 M. & S. 240.
(*c*) 16 East, 214.

In the case before us, the jury have found that the hides were so far damaged by a peril of the sea that they never could have arrived in the form of hides. By the process of fermentation and putrefaction which had commenced, a total destruction of them, before their arrival at their port of destination, became inevitable, as if they had been cast into the sea, or consumed by fire. Their destruction not being consummated at the time they were taken out of the vessel, they became in that state a salvage for the benefit of the party who was to sustain the loss, and were accordingly sold; and the facts of the loss and the sale were made known at the same time to the assured. Neither he nor the underwriters could at that time exercise any control over them, or by any interference alter the consequences. It appears to us, therefore, that this is not the case of what has been called a constructive loss, but an absolute total loss of the goods: they could never arrive, and at the same moment when the intelligence of the loss arrived all speculation was at an end.

It has indeed been strenuously contended before us, that the sale of the hides, whilst they remained in specie, rendered abandonment necessary to make the loss total; that the money produced at the sale became vested in the assured; that he had an undoubted right to keep it, if he thought proper, and to treat the loss as an average one; and that, wherever it is in his power to treat the loss as an average one, an abandonment is necessary to make it a total loss. The assured has certainly always an option to claim or not, but his abstaining from his right does not alter the nature of it; and if it be true that the proceeds of the sale vested in him, they would equally have done so, if, instead of being sold in specie, the hides had actually changed their form, and had been sold as glue, or manure, or ashes. The argument, therefore, in effect, resolves itself into this question, whether, when a total loss has taken place before the termi-
[*361] nation of the insured voyage, with a salvage of some portion of *the subject insured which has been converted into money, the assured is bound to abandon, before he recovers for a total loss? If any doubt should exist upon this point, it is important that it should be well considered and determined.

The history of our own laws furnishes few, if any, illustrations of the subject of abandonment, before the time of Lord *Mansfield*. That great Judge was obliged to resort to the aid of foreign codes, and to the opinions of foreign jurists, for the rules and principles which he laid down in the leading cases of *Goss* v. *Withers*, (*a*) and *Hamilton* v. *Mendez*. (*b*) But even these principles are, comparatively speaking, of modern date. The most ancient codes of the law maritime, when it was considered as part of the law of nations, contain no chapter upon assurance, neither do the earliest municipal codes, nor the earliest treatises upon assurances, make any mention of abandonment. When a policy of assurance was considered in the nature of a wager, it was needless to treat of abandonment.

The code of *Florence*, which bears date 1523, contains no allusion to that topic. The decisions of the Rota of *Genoa*, at the time that state was most eminent for its naval power and commercial enterprise, have been preserved by *Straccha*. Amongst them are found many cases of assurance upon sea risks: not one of them contains any questions about abandonment. The same author has written a very elaborate treatise upon assurances, but is equally silent on the subject of abandonment. He has preserved in his treatise the form of a policy, bearing date at *Ancona*, *Oct.* 20, 1567: from the terms of that policy it is difficult to infer any right or duty of abandonment; it contains this clause: "Et si delle mercantie assecurate intervenisse o fosse intervenuto alcun disastro

(*a*) 2 Burr. 683. (*b*) 1 W. Black. 276.

li assecuratorj debbono dare et pagare quelli danari assecurati al detto assecurato fra misi due dal di che in *Ancona* ne fosse vera nueva. Et si pretendissero per ragione alcuna dire incontrario non possono esser uditi *da [*362] corte, guidice, o magritrato alcuno, si prima non averanno pagati effectualmente clanari contanti." So that not only two months after the credible news of any disaster was the underwriter bound to pay a total loss, but, if he meant to contest the claim, he was within that time to purchase the right of litigation by first paying the sum insured. It was, however, to be restored to him in the event of his success. There is also a clause in the policy, by which, if there was no account of the ship for twelve months, the underwriter was bound to pay at the end of that time, subject to restitution, if the ship should afterwards arrive: a provision wholly inconsistent with any notion of abandonment. The same law probably prevailed at that period throughout the states of Italy.

But when assurances came to be considered as contracts of indemnity, and not as mere wagers, it became necessary to make some rules for the conduct of the parties where the loss was average, as well as to secure to the assured, when it was total, the full measure of his indemnity, and no more. The obligation of abandonment was the necessary consequence of confining the object of the contract to a strict indemnity. Accordingly we find in the chapter of Assurances in the civil statutes of *Genoa*, in 1610, the disaster upon which the underwriter is bound to pay is limited and defined to be the incapacity of the ship to proceed within a month after she had been disabled, or the detention of her by force, and the compulsory dereliction of her voyage, whereby she is forced to land the goods insured.

In those cases the assured may either abandon the goods, and demand the full insurance, or make up the amount of the loss and demand from the underwriters, who, if it amount to 50 per cent., shall have their option either to pay that sum and leave the goods to the assured, or to pay the whole and take the goods. By the same law wager policies are prohibited and declared void. Here it is clear that the object of the law was to limit the claim of the assured to a strict indemnity. The same principle will be found in the various *codes of the other maritime states of *Europe*, in which [*363] abandonment is mentioned; though it must be admitted that the rules they have respectively adopted are very different. In some abandonment is merely permissive, and limited to very few cases. In others, as in the codes of *Rotterdam* and *Amsterdam*, abandonment was imperative even in the case of an absolute total loss. Such seems to have been the law of *France*, as established by the ordinances of Louis XIV., in 1681. From the words of that code, indeed, it might be thought that they were only intended to prohibit in all but the specified cases, and not to enforce it as a preliminary condition for recovering an absolute total loss:—"Ne pouvra le delaissement etre fait qu'en cas de prise, naufrage, bris, échoument, arret de prince, en perte entière des effets assurées: et tous autre dommages ne seront reputés q'avariès."

Emerigon, in his *Treatise des Assurances*, c. 17, s. 1, remarks, that abandonment presents to the mind the idea of a thing existing in whole or in part, or at least the idea of a doubtful existence; for it appears absurd to renounce to the assurers a thing of which the absolute loss is already established. Nevertheless, he says, "According to our maritime laws, we may abandon to the underwriters a thing entirely lost, and, however singular it may appear, the law requires the form of an abandonment in the process of an action *de delaissement*, though it be stated that the goods have actually ceased to exist." This apparent inconsistency in the law of *France* is now removed by the *Code de Napoleon*. Under the title "*Du Delaissement*," in the *Code de Commerce*, there are seven cases enumerated in which abandonment is permitted, amongst

which the "perte entière des effets assurées," is not to be found. There is, indeed, a power given to abandon in case the loss or damage of the goods amounts to three-fourths; but the necessity of an abandonment seems to be guarded against expressly by the article 372, which provides, "that the abandonment shall extend to nothing but those effects which are the object of the assurance and of the risk." But, whatever lights might *have
[*364] been heretofore derived from foreign codes and jurists, the practice of insurance in *England* has been so extensive, and the questions arising upon every branch of it so thoroughly considered and settled, that we need not now look beyond the authorities of the *English* law to illustrate the principle on which the doctrine of abandonment rests, and the consequences which result from it. It is, indeed, satisfactory to know that however the laws of foreign states upon this subject may vary from each other or from our own, they are all directed to the common object of making the contract of insurance a contract of indemnity, and nothing more. Upon that principle is founded the whole doctrine of abandonment in our law.

The underwriter engages that the object of the assurance shall arrive in safety at its destined termination. If in the progress of the voyage it becomes totally destroyed or annihilated, or if it be placed by one of the perils he insures against, in such a position, that it is wholly out of the power of the assured or the underwriter to procure its arrival, he is bound by the very letter of his contract to pay the sum insured. But there are intermediate cases. There may be a capture, which, though *primâ facie*, a total loss, may be followed by a recapture, which would revest the property in the assured. There may be a forcible detention, which may speedily terminate, or may last so long as to end in the impossibility of bringing the ship or the goods to their destination. There may be some other peril which renders the ship unnavigable without any reasonable hope of repair, or by which the goods are partly lost, or so damaged as they are not worth the expense of bringing home. In all these or any similar cases—if a prudent man not insured, would decline any further expense in prosecuting an adventure, the termination of which will probably never be successfully accomplished; a party insured may, for his own benefit, as well as for that of the underwriter, treat the case as one of a total loss, and demand the full sum insured. But if he elects to do this, as the thing insured,
[*365] or a portion of it, still exists, *and is vested in him, the very principle of the indemnity requires that he should make a cession of all his right to the recovery of it, and that too, within a reasonable time after he receives intelligence of the accident, that the underwriter may be entitled to all benefit of what still may be of any value. In all these cases, not only the thing assured, or part of it, is supposed to exist in specie; but there is a possibility, however remote, of its arriving at its destination, or at least of its value being affected by the measures that may be adopted for the recovery or preservation of it. If the assured prefers the chance of any advantage that may result to him beyond the value insured, he is at liberty to do so; but then he must also abide the risk of the arrival of the thing insured, in such a state as to entitle him to no more than an average loss. If, in the event, the loss should become absolute, the underwriter is not less liable upon his contract, because the assured has used his own exertions to preserve the thing insured, or has postponed his claim till that event of a total loss has become certain, which was uncertain before. In the language of Lord *Ellenborough* in the case of *Mellish* v. *Andrews*, (*a*) "It is an established and familiar rule of insurance, that when the thing insured subsists in specie, and there is a chance

(*a*) 15 East, 13.

of its recovery, there must be an abandonment. A party is not in any case obliged to abandon, neither will the want of abandonment oust him of his claim for that which is in fact an average or total loss, as the case may be." Again, in *Mullet* v. *Sheddon*, (*a*) the same learned Judge says:—"If, instead of the saltpetre having been taken out of the ship and sold, and the property divested, and the subject-matter lost to the owner, it had remained on board the ship, and been restored at last to the owner, I should have thought that there was much in the argument, that in order to make it a total loss there should have been notice of abandonment, and that such notice should have been given sooner; but here the property itself was entirely lost to the owner, and the *necessity of any abandonment was altogether done away." In that case the sentence under which the sale was made had been [*366] reversed, and the proceeds directed to be paid to the owner, so that there was a substitution of money for a portion at least of the matter insured.

Both these cases are direct authorities to show that no abandonment is necessary "where there is a total loss of the subject-matter insured." His Lordship referred to cases of equal authority with the preceding, (which will deserve a more particular notice by us in this section) and to an important case of *Cambridge* v. *Anderton*, (*b*) and said "this last is in all points similar to the present, and is an express decision, that when the subject-matter insured has, by a peril of the sea, lost its form and specie, where a ship, for example, has become a wreck, or a mere congeries of planks, and has been *bonâ fide* sold in that state for a sum of money—the assured may recover a total loss without an abandonment. In fact, when such a sale takes place, and in the opinion of the jury, is justified by necessity, and a due regard to the interest of all parties, it is made for the benefit of the party who is to sustain the loss; and if there be an insurance, the net amount of the sale becomes money, had and received to the use of the underwriter, upon payment by him of the total loss. It may be proper to mention, however, that the assured may preclude himself from recovering a total loss, if, by any view to his own interest he voluntarily does or permits to be done, any act whereby the interests of the underwriters may be prejudiced in the recovery of that money. Suppose, for example, that the money received upon the sale should be greater than, or equal to the sum insured, if the assured allows it to remain in the hands of his agent, or of the party making the sale, and treats it as his own, he must take upon himself the consequence of any subsequent loss that may arise of that money, and cannot throw upon the underwriter a peril of that nature. This is the true principle of the case of *Mitchell* *v. *Edie*, (*c*) which was cited as an authority for the decision of the Court of Common Pleas. There the [*367] insurance was upon sugar "from *Jamaica* to *London*." The ship had been captured by a privateer, deprived of some of her crew and a portion of her stores—then released, and carried by the remainder of the crew into *Charlestown*, where she arrived on the 18th *February*, 1782. The report does not state when the intelligence of this reached *London*, but it is probable that it must have reached the assured before the month of *June* following. One of the owners of the ship was resident at *Charlestown;* he took possession of her; and instead of despatching her on the original voyage, he sold the cargo of sugar in the month of *June*, and sent the ship on another voyage. He had been connected with the assured in former adventures. He retained the money in his hands, and came to *England* in *June*, 1783. The assured pressed him for payment of the money, but took no steps to recover it; he became insolvent

(*a*) 13 East, 304.
(*b*) 2 B. & C. 697.
(*c*) 1 T. R. 608.

the following year: no claim was made upon the underwriter till after this event; and then, after the expiration of three years, from the alleged loss of the goods, notice of abandonment was given and the action brought: upon which the defendant paid into Court sufficient to cover a general average, and pleaded the general issue. The Court gave judgment against the plaintiff, stating that he had abandoned too late. And it cannot be disputed, that, if ever he had any colour for claiming a total loss, it must have been upon an abandonment before he heard of the sale, as he afterwards gave credit to his agent for the money, and elected to treat it as his own, till the event of an insolvency which prevented the underwriter from recovering it. But, in fact, there never was a total loss by peril of the sea. The sugars were safe at *Charlestown*, and the sale by the owner of the ship was not a loss by a peril insured against. The secret of the conduct of the assured may be discovered by a reference to the dates and the circumstance of the time. *During the war with [*368] *America*, and especially towards the close of it, the intercourse between that country and the *West India* islands was much interrupted; and the price of colonial produce was higher in *Charlestown* than in *London*. It was therefore probably his interest to give up his claim upon the underwriters, and adopt the sale. If, therefore, the sale of the goods could have been treated as a loss, the conduct of the assured had either deprived him of the right to claim it, or made him liable if he had the right to account to the underwriters for the amount of the sale. If, indeed, the Court must have treated the sale at *Charlestown* as a loss, for which the underwriter was at any time responsible, the case may be an authority for establishing the principle, that, even when a total loss has occurred by a sale of the goods, the assured may, by his own conduct, in electing to take the proceeds, instead of making his claim upon the underwriters—if he thereby alters the position of the facts, so as to affect the interest of the underwriter, forfeit his claim to recover a total loss. But the case is in no view an authority for the judgment of the Court of Common Pleas, which for these reasons, we think, ought to be reversed."—Judgment reversed.

I shall now proceed to consider the earlier cases upon this subject, and endeavour to show how the law of abandonment as settled at this day, according to the important judgment we have just referred to, may be seen to have regularly proceeded from those first principles which were laid down chiefly by Lord *Mansfield*. I shall commence by going back to the important case of *Goss* v. *Withers*, (*a*) which we dwelt on for so long a time in the section on capture. (*b*)

It will not be necessary to go over the ground we traversed before, respecting the effect of capture upon the contract of insurance. It is as well briefly to state what the case was. The case stated that the ship departed from her proper port, and was taken by the *French*, on the 23rd of *December*, 1756; and that the master, mates, and all the sailors, (except [*369] an apprentice, and landsman) were taken out and carried to *France*. That the ship remained in the hands of the enemy eight days, and was then retaken by an *English* privateer, and brought in, on the 18th of *January*, to *Milford Haven;* and that immediate notice was given by the assured to the assurers, with an offer to abandon the ship to their care. Several questions arising upon the first cause, it was agreed that the jury should bring in their verdict in both causes for the plaintiffs as for a total loss, subject, however, to the opinion of the Court on two questions, the second of which is now to be the subject of our consideration (the first having been already disposed of).

(*a*) 2 Burr. 683.

(*b*) See *ante*, sec. xii, p. 287.

The second question is this:—"Whether, under the several circumstances of this case, the assured had or had not a right to abandon the ship to the assurers, after she was carried into *Milford Haven?*"

It was argued by counsel for the plaintiffs, "that the assured had a right to abandon the ship to the assurers, after her coming into *Milford Haven*. For the property insured was irrecoverably destroyed. And here was immediate notice of abandoning to the assurers given." They quoted *Molloy*, (*a*) and *Malyne's* "*Lex Mercatoria*," (*b*) for the rules of abandoning. *Malyne* puts it, "where there is no possibility of putting to sea with the thing insured." Here the ship was freighted with a "perishable" commodity, (fish from *Newfoundland*) bound to hot countries; was taken; and afterwards retaken and brought into *Milford Haven* without sufficient hands of her own, and requiring so much refitment as was impossible to be finished before the cargo would and must be spoiled; and part of the cargo was thrown overboard, too, in the storm, before she was taken. To what purpose, then, should the assured be at the expense of refitting the ship, to carry a "spoiled and useless" cargo?

*Little is to be found in the books about abandoning. The rule laid down was, "That the assured has a right to abandon to the [*370] assurers where there are no hopes of saving the perishable cargo, (*a*) provided there is no fraud."

This ship was in port; the hands all in *France*, in prison. Besides, here was a total loss; for the costs of salvage exceeded the value of the thing saved. Therefore they had a right to abandon.

The counsel for the defendant argued that the case stated did not entitle the assured to abandon. This right to abandon supposes a total loss; but the loss was only average. As to *Molloy* and *Malynes*, they said almost anything might be proved from their writings.

It has been urged, "that the assured can in no case abandon." On the contrary, all provincial laws allow the power of abandoning in some cases. (*b*)

Lord *Mansfield* delivered the judgment of the Court on the 23rd of *November*, 1758.

"The single question, therefore, upon which this case turns is, 'Whether the assured had under the circumstances, upon the 18th of *January*, 1757, an election to abandon?'

"The loss and disability was in its nature total, at the time it happened. During eight days the plaintiffs were certainly entitled to be paid by the assurers as for a total loss: and, in case of a recapture, the assurer would have stood in his place. The subsequent recapture is, at best, a saving only of a small part: half of the value must be paid for salvage. The disability to pursue the voyage still continued. The master and mariners were prisoners. The charter-party was dissolved. The freight (except in proportion to the goods saved was) lost. The ship was necessarily brought into an *English* port. What could be saved might not be worth the expense attending it, (which is proved by the plaintiffs' offer *to abandon.) The subsequent title [*371] to restitution arising from the recapture, at a great expense, of the ship, disabled to pursue her voyage, cannot take away a right vested in the assured at the time of the capture. But, because he cannot recover more than he has suffered, he must abandon what may be saved. The better opinion of the book says,—'Sufficit semel extitisse conditionem, ad beneficium assecurati,

---

(*a*) Lib. 2, c. 7, p. 278. (*b*) Pp. 111, 115.

(*a*) See *ante*, p. 364, and Roux v. Salvador, 4 Scott, p. 25.

(*b*) Lord Mansfield here observed, "It goes so far back as the Rhodian law, and the laws of Oleron." 2 Burr. 692.

de amissione navis; etiam quod postea sequeretur recuperatio: nam per talem recuperationem non potuit præjudicari assecurato.' I cannot find a single book, ancient or modern, which does not say, 'that, in case of the ship being taken, the assured may demand as for a total loss, and abandon.' And what proves the proposition most strongly is, that, by the general law, he may abandon in the case merely of an arrest or an embargo, by a prince not an enemy. Every argument holds stronger in the case of the other policy with regard to the goods. The cargo was, in its nature, perishable; (*d*) destined from *Newfoundland* to *Spain* or *Portugal;* and the voyage as absolutely defeated as if the ship had been wrecked, and a third or a fourth of the goods saved. No capture by the enemy, though condemned, can be so total a loss as to leave no possibility of recovery. If the owner should take at any time, he will be entitled; and by the act of Parliament, if an *English* ship retakes at any time (before condemnation or after,) the owner is entitled to restitution, upon stated salvage. This chance does not suspend the demand for a total loss upon the assurer; but justice is done by putting him in the place of the assured, in case of a recapture.

"In questions upon policies, the nature of the contract as an indemnity, and nothing else, is always liberally considered. There might be circumstances under which capture would be but a small temporary hindrance to the voyage—perhaps none at all: as if a ship was taken, and in a day or two escaped entire, and pursued her voyage.

[*372] *"There are circumstances, under which it would be deemed an average loss: if a ship taken, is immediately ransomed by the master, and pursues her voyage, there the money paid is an average loss. And in all cases the assured may elect 'not to abandon.'

"In the second part of "*Usage and Customs of the Sea*,' a treatise is inserted called '*Guidon*,' where, after mentioning the right of abandonment upon a capture, he adds, 'or any other such disturbance as defeats the voyage, or makes it not worth while, or worth the freight to pursue it.'

"I know that in late times, the privilege of abandoning has been restrained for fear of letting in frauds: and the merchant cannot elect to turn, what at the time when it happened, was in its nature (*a*) but an average, into a total loss by abandoning. But there was no danger of fraud in this case. The loss was total at the time that it happened. It continued total, as to the destruction of the voyage. A recovery of any thing could be had, only upon paying more than half the value (including the costs.) What could be saved of the goods, might not have been worth the freight for so much of the voyage as they had gone when they were taken. The cargo, from its nature, must have been sold where it was brought in. (*b*) The loss, as to the ship, could not be better estimated, nor the half of the salvage be fixed by a better measure than a sale. In such a case, there is no colour to say that the insured might not disentangle himself from unprofitable trouble, and further expense; and leave the assurer to save what he could. It might as reasonably be argued, that if a ship sunk, was weighed up again at great expense, the crew having perished, the assured could not abandon nor the assurer be liable, because the ship was saved.

"We are, therefore, of opinion, that the loss was total, by the capture; and

[*373] the right which the owner had, after the *voyage was defeated to obtain restitution of the ship and cargo, paying great salvage to the recaptor, 'might be abandoned to the assurers, after she was brought into *Milford Haven.*'" The *postea* was given to the plaintiffs in both cases.

(*d*) See *ante*, p. 360, and Roux v. Salvador, 4 Scott, p. 25.
(*a*) See the case of Mitchell v. Edie, 1 T. R. 608, *ante*, p. 367.
(*b*) See the case of Roux v. Salvador, 4 Scott, p. 26.

There is a case of *Pringle* v. *Hartley*, (*a*) in Chancery, which is applicable to the preceding case. The defendant had insured the ship *Success* from *London* to *Bermudas*, and so to *Carolina;* the ship was taken by a *Spanish* privateer, and afterwards retaken by an *English* privateer, and carried into *Boston* in *New England*, where, no person appearing to give security, or to answer the moiety, the recaptors were entitled to for salvage, she was condemned and sold in the Court of Admiralty there: the recaptors had their moiety, and the overplus money remained in the hands of the officers of that Court. An action upon the policy was brought at law by the defendant here, who obtained a verdict against the now plaintiff.

The plaintiff brought a bill, suggesting the capture to be fraudulent. and done designedly by the captain; and now moved for an injunction to stay the proceedings at law.

It was contended for the plaintiff, that though the capture might not be fraudulent, yet the defendant ought not to recover more on the policy than a moiety of the loss, as the act of the 13 Geo. 2, c. 4, s. 18, gives the thing saved to the owner, and he is entitled to receive it from the officers of the Admiralty: and that the plaintiff ought to be obliged to pay no more than the loss actually sustained, which cannot be ascertained till after the defendant shall have received the part that might have come to him upon the salvage.

The defendant in his answer had sworn, that he had offered, and was now willing to relinquish his interest to the plaintiffs in the benefit of the salvage, and would give them a letter of attorney for that purpose to receive it.

Lord Chancellor *Hardwicke.*—"There is no ground for *an [*374] injunction in this case; here there was an agreement to go to trial in one of these actions, which had been brought, and to be bound by the event of that: at the time of the trial, they knew that the ship was retaken, and the manner of the capture. The *quantum* of the damage and loss sustained is the only thing now to be disputed; for it is impossible to carry on trade without insuring, especially in time of war. Therefore regard must be had to the insured, as well as to the insurer; and where there is no admission in the answer of any kind of fraud, though various pretences of that sort may be set up by the bill, they are not to be regarded. The question then arises on the statute of 13 Geo. 2, with regard to the salvage. It has been said, there ought to be only half the loss recovered in the policy; and as to that, the act has made great alteration in the law of nations with respect to recaptures. The carrying a ship *infra præsidia hostium*, or *si pernoctaverit* with the enemy, makes it the prize of the person retaking it, as if it had been originally the ship of the enemy: but by the act, the recaption is the revesting of the property of the owner. If there is a salvage, that must be deducted out of the money recovered by the policy; but if none has come to the hands of the plaintiff in the action, the jury cannot take notice of it. The ship was condemned and sold, because the money was not paid, or secured to be paid by the owners. It is uncertain whether the defendant will receive any thing or not; and if any thing be recovered, he must have an allowance for his expenses in recovering. Therefore I take it, when he is willing to relinquish his interest in the salvage, he ought to recover the whole money insured. It would be mischevious if it were otherwise, for then upon a recapture a man would be in a worse situation than if the ship were totally lost." Injunction was denied.

The case of *Milles* v. *Fletcher*, (*b*) is a most important case, which is particularly illustrative of the principles which we are now treating.

(*a*) In Chan. 1744. 3 Atk. 195. (*b*) Doug. 231.

[*375] *The case was this:—It was an action on a policy of insurance, on the ship, *The Hope* and her freight, from *Montserrat* to *London*. The plaintiff went for a total loss: the defendant insisted, that he was only entitled to recover for an average loss. The jury found a verdict for a total loss; and upon a motion for a new trial, the facts of the case appeared to be as follows:—The ship, when proceeding on her voyage, was captured on the 23rd of *May*, by two *American* privateers, who took the captain and all the crew, and part of the cargo, which consisted of sugars, out of her. The rigging was also taken away. She was afterwards retaken, and carried into *New York*, where the captain arrived on the 23rd of *June*, and, taking possession of her, found that part of what had been left of the cargo was washed overboard, that fifty-seven hogsheads of what remained were damaged, and that the ship was leaky, and in such a state, that she could not be repaired without unloading her entirely. The owners had no storehouses in *New York*, in which the sugars could have been put, while the ship was repairing, nor any agent there to advise or direct the captain. No sailors were to be had. The only method he had of paying the salvage, which amounted to the value of forty hogsheads of sugar, was by sale of part of the cargo, or the ship. The captain did not know of the insurance. If he had repaired the ship, his expenses would have exceeded the freight more than 100*l.* There was an embargo on all vessels at *New York* till the 27th of *December;* and by the destination of his ship, she was to have arrived at *London* in *July*. Under these circumstances, he consulted with his friends at *New York*, and resolved, upon their opinion and his own, to sell the ship and cargo, as the most prudent step for the interest of his employers. The cargo was accordingly sold and paid for. The ship was also contracted for, but the person who had agreed to buy her ran away, and the captain left her in a creek near *New York*, and returned to *England*, where he arrived in the *February* following, and gave the plaintiff notice of what had been done, which was the first information he received of

[*376] *it, and the plaintiff immediately claimed as for a total loss from the underwriters, and offered to abandon. Lord *Mansfield* told the jury, that if they were satisfied the captain had done what was best for the benefit of all concerned, they must find as for a total loss, which they accordingly did.

Upon the motion for a new trial, the unanimous opinion of the Court was delivered by

Lord *Mansfield*.—"The great object in every branch of the law, but especially in mercantile law, is certainty, and that the grounds of decision should be precisely known. I took great pains in delivering the opinion of the Court in the case of *Goss* v. *Withers*, and *Hamilton* v. *Mendez*. I read both those cases over last night, and I think that from them, the whole law between insurers and insured, as to the consequences of capture and recapture, may be collected. It was not contended that a capture necessarily amounts to a total loss between insurer and insured; nor, on the other hand, that on a capture and recapture, there may not be a total loss, though there remain some material tangible part of the ship and cargo. Neither was it contended that the captain has an arbitrary power, by his act, to make the loss, either average or total, as he pleases. A great deal has been said about what the Admiralty could, or would have done, in such a case, in order to pay the salvage. As to that, if no owner appeared, they would condemn the whole; but if they saw, from the ship's papers, that there was one, they would not. If there were different claimants of the ship and cargo, they would leave it to them to say what part should be sold: and if they differed in opinion, would order the sale of such part as would be attended with the smallest loss. But all that is foreign to the present question, which is singly this, whether the consequences of the capture

were such as, notwithstanding the recapture, occasioned a total obstruction of the voyage, or only an average one, as in the case of *Hamilton* v. *Mendez?* In that case, and in *Goss* v. *Withers*, great stress was laid on the situation of the ship and cargo, at the time when the insured had notice, at the time of the offer to abandon, *and at the time when the action was brought. [*377] No cases say that the bare existence of the hull of the ship prevents the loss being total. The rule is laid down, "that if the voyage be lost, or not worth pursuing, if the salvage be high, if further expense be necessary, if the insurer will not at all events undertake to pay that expense, &c., the insured may abandon, notwithstanding a recapture." Here, at the time of the capture, there were no hopes of a recovery; no friend's ship in sight; no means of resistance; all the crew were taken out, and part of the cargo; and the rigging also taken away. Afterwards the ship was retaken, and carried into *New York*. When she was brought there, it still continued a total loss. Neither the insurers, nor the insured, had any agent in the place. The Court of Admiralty must have proceeded *secundùm æquum et bonum*, and might have sold her for the benefit of those concerned. When the insured first had notice, and offered to abandon, (which was when the captain came to *England*,) and when the action was brought, it was still a total loss. The voyage was abandoned, the cargo sold, and the ship left to be sold. The only answer the defendant makes, or can make to this is, that the loss was total indeed; but that the captain made it so, by his improper conduct; for that on his taking possession of the ship, the loss became average, and that he ought to have pursued the voyage. But is this defence true in fact? The captain, when he came to *New York*, had no express order: but he had an implied authority, from both sides, to do what was fit and right to be done, as none of them had agents in the place: and whatever it was right for him to have done, if it had been his own ship and cargo, the underwriter must answer for the consequences of, because this is within his contract of indemnity. (*a*) Suppose there had been no insurance, what *ought the captain to have done? 1st, As to the cargo, according to the course of the voyage, the ship [*378] should have arrived at *London* in *July*. On the capture, part had been taken out, some was washed overboard, fifty-seven hogsheads were damaged, and the whole, from the leaking of the vessel, was in a perishable state. There were no storehouses; nor could the ship proceed in the state she was in. The crew were gone, and an embargo was laid on till *December*. What, shall a cargo, which was intended to arrive at *London* in *July*, be kept in a perishable state at *New York*, in a leaky vessel, till *December?* 2ndly, As to the ship, it was certainly better to sell her than to bring her to *London*. There was no crew belonging to her, and she had no cargo. Even if all the cargo had been left, the expenses of repairs would have exceeded the freight. If she had been brought home, the expense of bringing her might have been more than what she would have sold for in *London*. It has been said, that the damage would not have fallen on the underwriters; but the argument drawn from thence is a fallacy; for that circumstance goes to determine it to be the interest of the insured to abandon the voyage. The point is, what did the owner suffer by the capture? and it appears that he suffered so much, that it was not worth while to pursue the voyage. The whole voyage was lost. As

(*a*) In the case of Reid v. Darby, 10 East, 143, the Court seemed to think that the captain had no authority to part with the ship; but should have repaired her and prosecuted his voyage. And in Johnson v. Shippen, 2 Lord Raym. 984, Lord Holt held expressly that the master had no authority to sell any part of the ship, but that he might hypothecate. See, however, the judgment of Lord Stowell, in the case of the Gratitudine, 3 Rob. A. R. 240.

the captain did not know of the insurance, he had no temptation to give the turn of the scale to one side or the other. I left it to the jury to determine, whether what the captain had done was for the benefit of the concerned. If they had found "that it was" in words, where would have been the question of law?"

The Court, therefore, discharged the rule for a new trial.

The more recent decisions seem to support the authority of the preceding case, and to establish the doctrine that the master may, in a case of absolute necessity, make a sale of the ship, if he act *bonâ fide*, and for the real benefit of the owners. But there must be the clearest proof of the necessity of the case:

[*379] it must not only be shown that the vessel *wanted repairs, but that it was impossible to procure the money for that purpose. (*a*)

Thus in an action on a policy of insurance on the ship *Lady Banks*, which had been sold by the master at the *Isle of France*, the jury found, first, that the master appeared to have acted according to the best of his judgment; secondly, that the sale was conducted fairly; and thirdly, that there was no necessity for the sale of the ship; the verdict was entered for the assured for an average loss only, and not for a total loss, with a benefit of salvage, which had been claimed. (*b*)

And where a ship insured to *New York* became so damaged and leaky in the course of the voyage, that the crew, overcome with fatigue, were obliged to desert her; and a fresh crew, from another vessel, took charge of her, and succeeded in bringing her to *New York*, where she was sold for payment of the salvage, without any endeavour on the part of the owner to prevent the sale: it was held, that the desertion of the crew did not make it a total loss; and that as it did not appear that the sale was necessary, or that the owners had done any thing to prevent it, it did not give them a right to abandon. (*c*)

We come now to the case of *Hamilton* v. *Mendez*, (*d*) which is one of the

[*380] most important cases decided by Lord *Mansfield*. It was a special case reserved at *Guildhall*, at the Sittings there before Lord *Mansfield*, after Michaelmas Term, 1760, in an action brought against the defendant, as one of the insurers, upon a policy of insurance from *Virginia* or *Maryland* to *London*, of a ship called the *Selby*, and of goods and merchandise therein, until she shall have moored at anchor twenty-four hours in good safety. The case stated for the opinion of the Court, was as follows:

That the ship *Selby*, mentioned in the policy, being valued at 1,200*l.*; and the plaintiff having interest therein, caused the policy in question to be made; and the same was accordingly made, in the name of John Mackintosh, on behalf and for the use and benefit of the plaintiff, and was subscribed by the defendant, as stated, for 100*l.* That the ship was in good safety at *Virginia*, where she took on board one hundred and ninety-two hogsheads of tobacco, to be delivered at *London*. That on the 28th day of *March*, she departed, and set sail from *Virginia* to *London;* and on the 6th day of *May* following, as she was

---

(*a*) The Fanny and Elmira, Ed. A. R. 117. Robertson v. Clarke, 1 Bing. 445, and see Royal Exch. Assur. Comp. v. Idle, which was a writ of error from the Court of Common Pleas, where it was decided that a necessity for the sale must appear, and a *venire de novo* was awarded to ascertain whether it existed or not. 3 Brod. & Bing. 151.

(*b*) Maeburn v. Leckie, tried before C. J. Dallas, March 5th, 1822. Abb. on Shipp. p. 5, (6th edit.) See also Freeman v. East India Comp. 5 B. & A. 617. Wilson v. Millar, 2 Stark. 1. Robertson v. Carruthers, 2 Stark. 571, and Hunter v. Parker, 7 M. & W. 342, where the Court of Exchequer seemed to concur with the recent authorities.

(*c*) Thorneley v. Hebson, 2 B. & A. 513, and see Falkner v. Ritchie, 2 M. & S. 290. But it is otherwise when the cargo is taken out of the possession of the assured by the barratrous act of the master and mariners. Dixon v. Reid, 5 B. & C. 597.

(*d*) 2 Burr. 1198; 1 W. Black. 276.

sailing and proceeding in her said voyage, was taken by a *French* privateer called the *Aurora* of *Bayonne*. That at the time of the capture, the *Selby* had nine men on board; and the captain of the said privateer took out six, besides the captain, leaving only the mate and one man on board. That the *French* put a prize-master and several men on board the ship *Selby*, to carry her to *France*. That as the *French* were carrying her towards *France*, on the 23rd day of the said *May*, she was retaken off *Bayonne* by an *English* man-of-war; and accordingly sent into *Plymouth*, where she arrived the 6th day of *June* following. That the plaintiff, living at *Hull*, as soon as he was informed what had befallen his ship, *The Selby*, wrote a letter on the 23rd of *June*, to his agent, John Mackintosh, living in *London*, to acquaint the defendant, "that the plaintiff did from thence abandon to him his interest in the said ship, as to the said 100*l.* by the defendant insured." That the said John Mackintosh, on the 26th of *June*, acquainted the defendant with the offer to abandon the ship; to which the *defendant answered, "that he did not think himself bound to take to the ship; but was ready to pay the salvage, and all other losses and charges that the plaintiff sustained by the capture." That upon the 19th day of *August*, the ship *Selby* was brought into the port of *London*, by the order of the owners of the cargo, and the recaptors. That the ship *Selby* sustained no damage from the capture. That the whole cargo of the said ship was delivered to the freighters, at the port of *London*, who paid the freight to Benjamin Vaughan, without prejudice. The question, therefore, submitted to the opinion of the Court is, whether the plaintiff, on the said 26th day of *June*, had a right to abandon, and has a right to recover, as for a total loss.

[*381]

After two arguments at the Bar upon this question, and after the Court had taken time to deliberate upon it, their unanimous resolution was delivered by the Chief Justice.

Lord *Mansfield*.—"The plaintiff has averred in his declaration, as the basis of his demand for a total loss, 'that by the capture, the ship became wholly lost to him.' The general question is, whether the plaintiff, who, at the time of his action brought, at the time of his offer to abandon, and at the time of his being first apprized of any accident having happened, had only, in truth, sustained an average loss, ought to recover for a total one? In support of the affirmative, the counsel for the plaintiff insisted on the four following points: 1st, That by this capture, the property was changed; and therefore, the loss total forever. 2dly, If the property were not changed, yet the capture was a total loss. 3dly, That when the ship was brought into *Plymouth*, particularly on the 26th day of *June*, the recovery was not such as, in truth, changed the totality of the loss into an average. 4thly, Supposing it did, yet, the loss having once been total, a right vested in the insured to recover the whole upon abandoning; of which right he could never be divested by any subsequent event.

"As to the first point. If the change of property were at all material between the insurer and insured, it would not *be applicable to this case; because by the marine law of *England*, there is no change of property, in case of a capture, before condemnation; and now, by the Act of Parliament, the *jus postliminii* continues for ever. (*a*) I know many writers argue, between the insurer and insured, from the distinction, whether the property was or was not changed by the capture, so as to transfer a complete right from the enemy to a recaptor, or neutral vendee, against the former owner. But arbitrary notions concerning the change of property by capture, as between

[*382]

(*a*) 29 Geo. 2, c. 34, s. 24.

the former owner and recaptor, or a vendee, ought never to be the rule of decision, as between the insurer and the insured upon a contract of indemnity, contrary to the real truth of the fact. And therefore I agree with the counsel for the plaintiff, upon this second point, that by this capture, while it continued, the ship was totally lost, though it be admitted, that the property, in the case of a recapture, never was changed, but returned to the former owner.

"The third point depends, as every question of this kind must, upon the particular circumstances. It does not necessarily follow that, because there is a recapture, therefore the loss ceases to be total. If the voyage be so defeated, as not to be worth the further pursuit; if the salvage be high, and the other expenses great; or if the underwriter refuse to bear these expenses, the insured may abandon. But in the present case, the voyage was so far from being lost, that it had only met with a short temporary obstruction; the ship and cargo were both entirely safe: the expense incurred did not amount to near half the value; and upon the 26th of *June*, when the ship was at *Plymouth*, and the offer was made to abandon, the insurer undertook to pay all charges and expenses, to which the plaintiff might be put by the capture. The only argument to shew that the loss had not then ceased to be total, was built upon a mistaken supposition, that the recaptor had a right to demand a sale, and to put
[*383] a stop to *any further prosecution of the voyage. But that is not so. The property returned to the plaintiff, pledged to the recaptors for one-eighth of the value, as salvage for retaking and bringing the ship into an *English* port. Upon paying this, the owner was entitled to restitution. The recaptor had no right to sell the ship. If they differed about the value, the Court of Admiralty would have ordered a commission of appraisement. In this case, it was the interest of the owner of the ship, the owners of the cargo, and the recaptors, that she should forthwith proceed upon her voyage from *Plymouth* to *London*. But had the recaptor opposed it, or affected delay, the Court of Admiralty would have made an order for bringing her immediately to *London*, her port of delivery, upon reasonable terms. Therefore, it is most clear, that upon the 26th day of *June*, the ship had sustained no other loss, by reason of the capture, than the short temporary obstruction, and a charge which the defendant had offered to pay and satisfy. This brings the whole to the fourth and last point.

"The plaintiff's demand is for an indemnity. This action, then, must be founded upon the nature of his damnification, as it really is, at the time the action is brought. It is repugnant upon a contract of indemnity to recover as for a total loss, when the final event has decided that the damnification, in truth, is an average, or perhaps no loss at all. Whatever undoes the damnification in whole or in part must operate upon the indemnity in the same degree. It is a contradiction in terms to bring an action for indemnity, when, upon the whole event, no damage has been sustained. The reason is so much founded in sense and the nature of the thing, that the common law of *England* adopts it, though inclined to strictness. The tenant is obliged to indemnify his lord from waste; but if the tenant do, or suffer waste to be done in houses, yet if he repair before any action brought, there lies no action of waste against him. (*a*) He cannot however plead 'non fecit vastum,' but the special matter. The special matter
[*384] *shows, that the injury being repaired before the action brought, the plaintiff had no cause of action; and, whatever takes away the cause, takes away the action. Suppose a surety sued to judgment; and afterwards, before an action is brought, the principal pays the debt and costs, and procures satisfaction to be acknowledged upon record: the surety can have no

(*a*) Co. Lit. 53, a.

action for an indemnity, because he is indemnified before any action is brought. If the demand or cause of action does not subsist at the time the action is brought, the having existed at any former time can be of no avail. But in the present case the notion of the vested right in the plaintiff to sue as for a total loss before the recapture, is fictitious only, and not founded in truth. For the insured is not obliged to abandon in any case; he has an election. No right can vest as for a total loss till he has made that election: he cannot elect before advice is received of the loss; and if that advice show the peril to be over, and the thing in safety, he cannot elect at all, because he has no right to abandon when the thing is safe. Writers upon maritime law are apt to embarrass general principles with the positive regulations of their own country: but they all seem to agree that, if the thing be recovered before the money is paid, the insured can only be entitled according to the final event." His Lordship here cited the passage from *Roccus*, (*a*) and then proceeded thus:—

"In the case of *Spencer* v. *Franco*, though upon a wager policy, the loss was held not to be total, after the return of the ship *Prince Frederick* in safety; though she had been seized and long kept by the king of *Spain* in a time of actual war. (*b*) In the case of *Pole* v. *Fitzgerald*, (*c*) though upon a wager policy, the majority of the Judges and the House of Lords held there was no total loss, the ship having been restored before the expiration of the four months, the time for which she was insured.

*"The present attempt is the first that ever was made to charge [*385] the insurer as for a total loss, upon an interest policy, after the thing was recovered; and it is said the judgment in the case of *Goss* v. *Withers* gave rise to it. It is admitted that that case was no way similar. Before that action was brought, the whole ship and cargo were literally lost: at the time of the offer to abandon, a fourth of the cargo had been thrown overboard; the voyage was entirely lost; the remainder of the cargo was fish perishing, and of no value at *Milford Haven*, where the ship was brought in; the ship so shattered, as to want great and expensive repairs; the salvage was one-half, and the insurer did not engage to be at any expense; it did not appear that it was worth while to try to save anything: and the recaptor, though entitled to one-half, as well as the owner of the ship and cargo, left the whole to perish, rather than be at any further trouble or expense. But it is said, though the case was entirely different, some part of the reasoning warranted the proposition now inferred by the plaintiff from it. The great principle relied upon was, 'that, as between the insurer and insured, the contract being an indemnity, the truth of the fact ought to be regarded; and therefore there might be a total loss by a capture, which could not operate as a change of property; and a recapture should not relate by fiction (like the *Roman jus postliminii*) as if the capture had never happened, unless the loss was in truth recovered.' This reasoning proved *è converso*, that if the thing in truth were safe, no artificial reasoning shall be allowed to set up a total loss. The words quoted at the Bar were certainly used, 'that there is no book, ancient or modern, which does not say that in case of the ship being taken, the insured may demand for a total loss, and abandon.' But the proposition was applied to the subject-matter, and is certainly true, provided the capture, or the total loss occasioned thereby, continue to the time of abandoning, and bringing the action. The case then before the Court did not make it necessary to specify all the restrictions. But I will read to you *verbatim*, from my notes of the *judgment then [*386] delivered, what was said, to prevent any inference being drawn beyond the case then determined."

(*a*) Roccus, Not. 50. (*b*) *Vide ante*, p. 27.
(*c*) See *ante*, p. 28, and *post*, in this section.

His Lordship, having read a great part of his former argument in that case, (*b*) went on in this way:—

"From this mode of reasoning, it did by no means follow, that, if the ship and cargo had, by the recapture, been brought safe to the port of delivery, without having sustained any damage at all, that the insured might abandon. But, without dwelling longer upon principles or authorities, the consequences of the present question are decisive. It is impossible that any man should desire to abandon in a case circumstanced like the present but for one or two reasons, namely, either because he has overvalued, or because the market has fallen below the original price. The only reasons that can make it the interest of the party to desire, are conclusive against allowing it. It is unjust to turn the fall of the market upon the insurer, who has no concern in it, and could never gain by the rise. And an overvaluation is contrary to the general policy of the marine law; contrary to the spirit of the act of 19 Geo. 2; a temptation to fraud; and a great abuse: therefore no man should be allowed to avail himself of having overvalued. If the valuation be true, the plaintiff is indemnified by being paid the charge he was put to by the capture. If he has overvalued, he will be a gainer if he be permitted to abandon; and he can only desire it because he has overvalued. This was avowed upon the first argument, and that very reason is conclusive against its being allowed. The insurer, by the marine law, ought never to pay less upon a contract of indemnity than the value of the loss: and the insured ought never to gain more. Therefore, if there were occasion to resort to that argument, the consequence of the determination would alone be sufficient upon the present occasion. But upon principles this action could not be maintained as for a total loss, if the question were to be judged by the strictest rules of common law: much less can it be [*387] supported for a total loss, as the question ought to be decided *by the large principles of the marine law, according to the substantial intent of the contract, and the real truth of the case. If the question is to depend upon the fact, every man can judge of the nature of the loss before the money is paid; but if it is to depend upon speculative refinements, from the law of nations, or the *Roman jus postliminii* concerning the change or revesting of property, no wonder that merchants are in the dark when doctors have differed upon the subject from the beginning, and are not yet agreed. To obviate too large an inference being drawn from this determination, I desire it may be understood that the point here determined is, that the plaintiff upon a policy can only recover an indemnity according to the nature of his case at the time of the action brought, or (at most) at the time of his offer to abandon. We give no opinion how it would be, in case the ship or goods were restored in safety, between the offer to abandon and the action brought, or between the commencement of the action and the verdict. And particularly I desire that no inference may be drawn 'that, in case the ship or goods should be restored after the money paid as for a total loss, the insurer could compel the insured to refund the money, and to take the ship or goods;' that case is totally different from the present, and depends throughout upon different reasons and principles. Here the event had fixed the loss to be an average only, before the action brought—before the offer to abandon, and before the plaintiff had notice of any accident; consequently before he could make an election. We are therefore of opinion that he cannot recover for a total, but for an average loss only; the quantity of which has been estimated by the jury at ten pounds per cent." (*a*)

(*b*) *Vide ante*, Goss v. Withers, p. 368 of this Treatise.

(*a*) See the case of Da Costa v. Firth, 4 Burr. 1970, where, at the close of the case, it is said, "Here is a solemn abandonment and a solemn agreement that the assurers shall be content with salvage in such proportion as the sum insured bears to the whole interest, and

*In the above case of *Hamilton* v. *Mendez*, Lord *Mansfield* in delivering the judgment expressly reserves for the Court (as a new point) the right to decide, without being fettered by that case, upon the question, if it should arise, "where the ship or goods insured should happen to be restored between the time of the offer to abandon, and the time of the action brought:" for, says his Lordship, "we give no opinion how it would be in case the ship were restored in safety, between the offer to abandon and the action brought." [*388]

This question, however, constituted a principal feature in a more recent case of *Bainbridge and another* v. *Neilson*, (*a*) which was tried by Lord Chief Justice *Ellenborough*, near fifty years after the decision of *Hamilton* v. *Mendez*. It was an action on a policy of insurance on the ship called the *Mary*, valued at 6,000*l.*, at and from *Liverpool* to any port or ports in *Jamaica*, during her stay there, and from thence to her port of discharge in *Great Britain*, (the rest of the policy is not material.) There was another count upon a policy on freight valued at 4,000*l.* upon the same voyage. At the trial, before Lord *Ellenborough*, the following facts were found. The ship sailed from *Jamaica* with a cargo and freight bound to *Liverpool*. On the 21st of *September*, she was captured during her homeward voyage by an enemy. On the 25th day of the same month she was recaptured. On the 30th day of *September*, the plaintiffs received intelligence at *Liverpool* of the capture, but not of the recapture, and on the day following communicated the same to the underwriters, and gave notice of abandonment. On the 2nd day of *October*, intelligence of the capture was confirmed. On the 6th of *October*, five days after the notice of abandonment, the plaintiffs received the first intelligence of the recapture of the vessel, and that she then lay at *Loch Swilley*, in *Ireland*, in safety, in the possession of the recaptors. This intelligence was immediately communicated to the underwriters, with notice that the plaintiffs nevertheless persevered *in their abandonment; but offered to do their best for the benefit of those who should ultimately be concerned and interested in the vessel, without prejudice. Under such offer, and by agreement with the underwriters, without prejudice to either party, the plaintiffs have compromised with the recaptors; the vessel has been restored, and has arrived at *Liverpool*, being her port of discharge according to the terms of the policy, where she now is in safety. And the owners have also without prejudice received the freight of the goods on board her, and the proportion of salvage and expenses of such goods. The plaintiffs obtained the possession of the vessel at *Loch Swilley* under the said agreement, after the notice of abandonment, but before the action was brought; and the vessel did not arrive at *Liverpool* till after the commencement of the action. The ship was never taken into an enemy's port, nor did she sustain any damage, whilst in possession of the enemy. The amount of the salvage, damages and charges upon the ship is 15*l.* 4*s.* 8*d.*, and upon the freight, 13*l.* 11*s.* 5*d. per cent.* on the sum insured. The defendants paid to the plaintiffs before the commencement of this action 57*l.* 12*s.* 2*d.*, being the amount of their proportion of an average loss upon the two policies, which the plaintiffs accepted, without prejudice to their claim of a total loss upon their abandonment. This case was fully argued at the Bar, and then, [*389]

---

for the assured to refund more than in that proportion would be contrary to the underwriter's own agreement. And, therefore, the net proportion only, in respect of the plaintiff's subscription, after deduction of salvage, ought to be returned to him; and that is paid into Court." The *postea* was delivered to the defendant.

(*a*) 10 East, 329; and see Parsons v. Scott, 2 Taunt. 363. Evereth v. Smith, 2 M. & S. 278. Falkner v. Ritchie, 2 M. & S. 290; and M'Iver v. Henderson, 4 M. & S. 575.

Lord *Ellenborough* said, "This case, though new in specie, is by no means new in principle: and though Lord *Mansfield*, in *Hamilton* v. *Mendez*, said, that he would not decide how the case would be, if the ship and goods were restored in safety between the offer to abandon, and the action brought; yet there can be no doubt what his decision would have been, if the facts of this case had been brought in judgment before him. The facts of the case are, &c., (here his Lordship stated the facts of the case as above related.) Now the question is, whether that, which in the result turns out to have been only an average loss, and that to a trifling extent, shall, because the notice of aban-
[*390] donment, which was given *under the supposition at the time that it was a total loss, be now recovered against the underwriters as a total loss, after it is ascertained to be only an average loss? To give effect to this claim would be greviously to enlarge the responsibility of underwriters, and to make them answerable not for the actual loss sustained by the assured, whom they have engaged to indemnify against the risks in the policy; but for a supposed total loss at the time of the notice to abandon, when that total loss, as it was supposed, had in fact ceased to exist. But it has been contended by the plaintiffs' counsel, that if the abandonment is once well made, a right of action thereby becomes vested, which cannot be devested by subsequent events. That proposition is not only not true in the whole, but is not true in any of its parts. The true effect of a notice of abandonment is only this, that if the offer to abandon turns out to have been properly made upon the supposed facts, which turn out to be true; the assured has put himself in a condition to insist on his abandonment. But it is not enough that it was properly made upon facts supposed to exist at the time, if it turn out that circumstances existed, unknown to the parties, which did not entitle the assured to abandon. The notice would be properly given, upon intelligence received, and really credited by the assured, of the ship's being wrecked, whether that intelligence were true or not, and although the letter conveying the intelligence should turn out to be a forgery: and yet it is clear that no right of action would vest, founded upon such abandonment, thus made upon false intelligence, without any fact to support it. What is the notice of abandonment more than this: that the assured, having had notice of circumstances, which entitle him, if true, to treat the adventure as a total loss, in contemplation of those existing circumstances, cast what is considered as a desperate risk on the underwriter? But does not all that presume the existence of those facts, on which the right results to him of calling upon the underwriters to indemnify him? But if all this turns out to be a misconception; if, at the time, it had ceased to be a total loss, and no
[*391] *damage had happened; or if the only damnification arises out of the very act, which has saved the thing insured from total loss, namely, the salvage on the recapture, the whole foundation of the abandonment fails. It was then argued, that if the right of abandonment once vested, and was acted upon in time, it cannot afterwards be devested by subsequent intelligence of other circumstances and events: but the case of *Macarthy* v. *Abel* is an authority to the contrary, (*a*) for there, though notice of abandonment were well given at the time, yet it was devested by subsequent circumstances, where it appeared that the cause of the abandonment had ceased to exist.

"Next it is contended, that by the ship's being carried into a port of *Ireland* out of the course of her voyage, after her recapture the right of abandonment revived. I do not, however, understand, whether this is insisted upon as an entire and distinct cause of abandonment, or as connected with the capture and recapture. If it grew out of the recapture, let us see what Lord *Mansfield*

(*a*) 5 East, 388, and *post*.

says of it in *Hamilton* v. *Mendez*. "The third point depends, as every question of this kind must, on the particular circumstances. It does not necessarily follow that, because there is a recapture, therefore the loss ceases to be total. If the voyage be so defeated, as not to be worth the further pursuit'—here no voyage is lost or defeated, for the voyage is performed. 'If the salvage be high'—here it is not so, but very trifling. 'If the other expenses be great, and the underwriter refuse to bear them'—here the expenses are not great, and the actual loss has been paid by the underwriters into the hands of the assured. If, indeed, after the recapture, the ship had been carried into a port abroad, and the sale had become inevitable, because no person would indemnify the recaptors for their one-eighth salvage, that might have made it a total loss: but that is not the present case: and therefore none of the circumstances put by Lord *Mansfield*, which, after a recapture, might still make the loss total, exist in this case. I cannot, however, *but consider, as at present [*392] advised, that the abandonment must be taken generally, as relating only to the actual state of things, at the time of the abandonment made; and if necessary to the decision of this case, I should wish to have that point fully considered. I am not disposed to enlarge the grounds of abandonment against underwriters—a privilege, which every one knows, has been much abused. In almost every case of a valued policy, it is the interest of the assured to abandon: and it therefore becomes the Court to watch every such case; and in no instance to enlarge that, which in its nature is only an average, into a total loss. In *Macarthy* v. *Abel*, it might as well have been said, that having been once a total loss, it was to continue a total loss: but it was held otherwise, and that case is no otherwise distinguishable, except eventually that turned out to be no loss: and this is only an average loss. But I can see no difference, whether it ceased, by subsequent events, to be a total loss altogether, or whether it was reduced by the events to so minute a loss as in the present case. Then, as in the case of *Godsall* v. *Boldero*, we look to the real nature of the contract in a policy of insurance: and there it was considered to be, as it is, a mere contract of indemnity. (*a*) Therefore, though in that case there was a total loss with respect to the subject-matter of the risk insured, yet circumstances having afterwards intervened, which addeemed the loss of the insured, he was held not to be entitled to recover. So here, as that which was supposed to be a total loss, at the time of the notice of abandonment first given, had ceased to be so, and in the event only a small loss has been incurred, that is the real amount of the damnification under this contract of indemnity; and that has been paid by the underwriters."

The three other Judges, *Grose*, *Le Blanc*, and *Bayley*, delivered their opinions, concurring with his Lordship: and judgment was pronounced for the defendant. (*b*)

*The principle of the law laid down in the preceding case, that [*393] the effect of an abandonment is only to put the assured into a condition to avail himself of it provided the offer turns out to be properly made upon the supposed facts, was lately recognized by the Court of King's Bench, in the case of *Naylor* v. *Taylor*. (*c*)

It was an action on a policy of insurance on goods by the ship *Monarch*, "at and from *Liverpool* to any port or place in the river *Plata*, with liberty, in the event of a blockade or being ordered off the river *Plata*, to proceed to

(*a*) 9 East, 72.

(*b*) Smith v. Robertson, 2 Dow. 474, and also Patterson v. Ritchie, 4 M. & S. 393. Brotherton v. Barber, 5 M. & S. 447.

(*c*) 9 B. & C. 718.

any other port, and there wait or discharge." The loss was averred to have been by capture. The ship sailed from *Liverpool*, and was taken by a *Brazilian* frigate, in the river *Plata*, and sent to *Rio de Janeiro* for adjudication; but was rescued by the master and crew, who brought the ship and cargo back to *Liverpool*, where the master landed and warehoused the goods. The assured, after they had heard of the capture, and after the rescue, but before they heard of it, gave notice of abandonment to the underwriters.

A verdict was found for the plaintiff, with liberty to the defendant to move to enter a non-suit, if the Court was of opinion that there was not a total loss.

Lord *Tenterden*, C. J.—"It is not necessary to deliver an opinion upon the effect of the rescue, or of the return to *Liverpool*. The late cases show that a mere loss of the adventure by retardation of the voyage, without loss of the thing insured, either by its being actually taken from the ship or spoiled, does not constitute a total loss, unless by the aid and effect of an abandonment. In the present case the goods have been brought back to *Liverpool*. It does not appear upon what grounds the master has detained them: if it be on the ground of a claim of the nature of salvage, the plaintiffs may have them on satisfying that claim. There is no proof that the goods are deteriorated. The particular [*394] adventure upon which they were sent has, indeed, been defeated: *but this fact will not of itself make the underwriters liable for a total loss. It therefore becomes necessary for the plaintiff to show that the abandonment has the effect of enabling them to recover as for a total loss. If the abandonment is to be viewed with regard to the ultimate state of facts as appearing before the action brought according to the opinion of the Court in *Bainbridge* v. *Neilson*, there has not, for the reasons already given, been a total loss. Doubts were expressed as to the propriety of the decision in *Bainbridge* v. *Neilson*, by a very high authority, in the case of *Smith* v. *Robertson*. (*a*) But, notwithstanding these doubts, the rule laid down in *Bainbridge* v. *Neilson* was adopted and acted upon by the Court in the two subsequent cases of *Patterson* v. *Ritchie*, (*b*) and *Brotherton* v. *Barber*. (*c*) We consider the point to have been well settled, and the rule established by these authorities; and the rule to enter a nonsuit must therefore be made absolute." (*d*)

There was a very recent case in the Court of Common Pleas of *Benson* v. *Chapman*. (*e*) It was an action of covenant on a policy of insurance, dated 12th *July*, 1839, made by the defendant, of "*The Neptune Marine Assurance Company of London*," on the ship *The Lord Cochrane*, "at and from *Pernambuco* to *Liverpool*." The insurance was declared on freight valued at 2000*l*. The cause came on for trial at *Guildhall*, on the 1st *July*, 1842, before Mr. J. *Erskine*, when a verdict was taken, by consent, for the plaintiff, subject to the opinion of the Court upon the following case. "The declaration alleged a loss by perils of the sea. The ship, whilst coming out of the harbour of *Pernambuco*, struck on a reef, and thereby received such injury as rendered it necessary to put back for repair; the cargo was taken out, and the ship repaired at a cost of 7,132*l*., including the charges of landing and reshipping the cargo. There being no other means for raising funds to pay for [*395] the repairs, the master *executed a bottomry bond, by which the ship, freight, and cargo for that sum, and her bottomry premium of 20*l*. per cent. The ship afterwards sailed for *Liverpool* with her original cargo on board, and arrived there in safety. The plaintiff, as soon as he

---

(*a*) 2 Dow. 474. (*b*) 4 M. & S. 393.
(*c*) 5 M. & S. 418.
(*d*) See also Calogan v. London Assur. Comp. 5 M. & S. 447.
(*e*) 7 Scott's N. R. 625.

received intimation of the extent of the damage done to the ship, gave notice of abandonment of ship and freight to the respective underwriters, and repudiated the bond; whereupon the ship was taken possession by the parties claiming under the bond, and sold under an order of the Admiralty Court. At the sale, the ship produced 1,675*l.*, which, with the freight earned on the homeward voyage, was paid over to the obligees.

Tindal, Chief Justice, now delivered the opinion of the Court. His Lordship, after stating the case, proceeded:—"Upon this state of facts, we are of opinion that there was a total loss of freight at the time of the damage sustained by the ship; and that the plaintiff, having abandoned to the underwriters on freight, is entitled to recover for such total loss. That there was a constructive total loss on ship, seems not to have been made a question. It is unnecessary to cite authorities to prove that, where the damage to the ship is so great from the perils insured against as that the owner cannot put her in a state of repair necessary for pursuing the voyage insured, except at an expense greater than the value of the ship, he is not bound to incur that expense, but is at liberty to abandon, and treat the loss as a total loss. And there seems to be as little doubt that the assured has the right of abandoning the freight where there has been a total loss of the ship. The assured has sustained a total loss of the freight, if he abandons to the underwriters on ship, and is justified in so doing; for after such an abandonment he has no longer the means of earning the freight, nor the possibility of ever receiving it, if earned, such freight going to the underwriters on ship. In the present case, when the ship was at *Pernambuco*, the cargo taken out, and the damage to the ship very much exceeding her value, and as the owner had no means of completing, except at a ruinous expense, if *at that time, he abandons to the underwriters, as the law allows [*396] him to do, the freight is as much lost to him as if the ship had been captured, and placed altogether out of his control. The defendant's counsel admits that, if the master, instead of repairing the ship at *Pernambuco*, had sold her there, the loss both of the ship and freight would have been total: but he contends that, as he did not sell, but borrowed money and repaired the ship, which brought the same cargo to *England* and earned her freight, the not paying the money borrowed was the voluntary act of the shipowner, and which alone prevented him from receiving the freight; and that he had no right to make the loss total by his own voluntary act. But, in the first place, the arrival of the ship with the cargo is not of itself sufficient to deprive the plaintiff of his right to recover, if he gave notice of abandonment at the time when there was a total loss. The ship must not only arrive, but must arrive in such circumstances, as Mr. Justice *Bayley* expresses it, in *Holdsworth* v. *Wise*, (*a*) 'that the assured may, if they please, have possession, and may reasonably be expected to take it." In that case the ship had been deserted by the crew, acting *bonâ fide* for the preservation of their lives, and had been taken possession of by the crew of another vessel, who took her into port, repaired her, and brought her into *England*, but subject to a claim for repairs and salvage equal to or exceeding her value. The owner having abandoned before he knew of the safety of the ship, was not bound to take the ship, but entitled to recover for a total loss. In that case, also, the captain had granted a bottomry bond, and the ship was taken possession of on her arrival in *England* by the persons claiming title under the bottomry bond. The case, therefore, bears a very close resemblance, no less in principle than in all its circumstances, to the present; for here the owner, in *England*, had abandoned both ship and freight immediately on hearing the damage done to the vessel, and had never afterwards

(*a*) 7 B. & C. 794; 1 M. & R. 673.

[*397] interfered *with either: here, also, the master had repaired, giving a bottomry bond for the money borrowed: here, also, the ship is taken possession of by the persons claiming under such bond; and the charge far exceeds the value of the ship and freight. We think the case above referred to does, in principle, decide that before us. In the events which took place, there never was a moment at which the owner of the ship could have earned or received the freight, after the ship sustained her injury, except at a cost far exceeding the value of ship and freight. After the cargo was unshipped at *Pernambuco*, he could not put it on board again, without incurring the expense of repairs beyond the value of the ship and freight: when the ship arrived in *England*, he could not receive the freight, without paying the amount of the bottomry bond. If the master had actually sold the ship at the time the damage was sustained, and the purchaser had brought her back and earned the freight, there is no doubt but that the owner could have recovered for a total loss after abandonment; and we see no substantial difference between his situation, under those circumstances, and the return of the ship pledged by a bottomry bond beyond her value. There seems no reason for holding that the act of the master in repairing, whilst the owner was ignorant of what was going on, should vary his rights, the case expressly finding 'that he never interfered in any way with freight or ship after the abandonment.' We, therefore, think that there should be a verdict entered for the plaintiff for 2000*l.*"

In the case, also, of *Young* v. *Turing and others*, (*a*) Lord *Abinger*, C. B., now delivered the judgment of the Court:—"This was an action on a policy of insurance, at and from *Rotterdam* to *Java* and *Sumatra*, and back again to a port in *Holland*, upon the ship *Eliza*, valued at 8,000*l.* In the course of her voyage, she was stranded on the *Goodwin Sands*, and plundered. She was afterwards removed, and brought first to *Ramsgate*, and then [*398] to *London*. The underwriters *had notice of abandonment. It appears by the evidence set forth in the bill of exceptions, that just before the time when the ship was cast away, she was worth 5,833*l.* sterling; that her value, as she lay, was 700*l.*; and that the salvage was 420*l.* Two *English* witnesses deposed that the expenses of repairing the ship in *England* would be 4,615*l.*; that, if she had been entitled to a *British* register, she would have been worth, when repaired, from 4,500*l.* to 4,700*l.*; and that, if she had been a *British* ship, it would have been prudent for a *British* owner to repair her. Several *Dutch* witnesses stated that the expense of repairing her in *Holland* would have been far greater; and that her value, when repaired in *Holland*, would, at the outside, have been 2,915*l.* The defendant's witnesses do not materially vary this evidence; but witnesses were called to show that the trading companies in *Holland* will not employ a vessel that has been stranded in the manner which this ship was stranded, however perfectly she might have been repaired; and that this circumstance affects her value in *Holland*.

The Chief Justice, in summing up, told the jury "that, in considering whether this was the case of an average or a total loss, they ought not to take into account the value in the policy. He also told them that in considering the same question, they ought to look at all the circumstances attending the ship, and to judge whether, under all those circumstances, a prudent owner, if uninsured, would have declined to repair the ship: and, if so, they might find it a case of total loss.

"To this charge of the Chief Justice two objections were taken, and are made the subject of this bill of exceptions. The first is, that he ought to have

(*a*) 2 Scott's N. R. 752.

told the jury that, in determining whether the loss was total, they ought to take into their consideration the estimated value of the ship in the policy.

"I am not aware of any case or principle in the law of insurance which makes the estimated value in the policy a circumstance on which the question of total or average loss ought to turn. The agreed value in the policy of the subject *insured is intended to save the expense and doubt that [*399] may attend the investigation of value, as affecting the quantum of compensation only. It may operate, according to events, to the advantage or detriment of either party; and, where no fraud exists, both are bound by it. We are of opinion that there is no ground for the first exception.

"The second exception is, that the Chief Justice ought not to have directed the jury to take into their consideration all the circumstances that affected the ship; and that he ought to have instructed them to lay entirely out of their consideration the national character of the ship, and the consequences resulting therefrom.

"We cannot agree to the propriety of this exception. The Chief Justice has laid down the usual and recognized rule, that the jury ought to consider whether under all the circumstances attending the ship, a prudent owner, if uninsured, would have repaired the vessel. Now, to the value of the repairs must be added to her value as she lay in the dock, that is, to 4,615*l.* must be added 700*l.*, making 5,315*l.* as the cost. Upon which the *Dutch* witnesses say her value in *Holland* would, on the outside, not have exceeded 2,915*l.* The *English* witnesses make the amount of the repairs less; and they say, had she been a *British* ship, with a *British* register, she would have been worth more than the repairs; and that, in that case, it would have been the interest of *British* owners to have repaired her; implying that, not having a *British* register, her value would not have equalled the repairs, and that it would not have been prudent in the plaintiffs to have repaired her. Now, the effect of this evidence is, that the ship, when repaired, would not have been worth the value of her repairs either in *England* or in *Holland*. It does not appear that she would have been worth more any where else. Is it, then, to be contended, that the jury are not to attend to the circumstances of the value of the ship when repaired? Has it ever been doubted that the value of a ship when repaired is an important criterion to determine whether she ought to be repaired or not after being *damaged? or that, if the amount of [*400] repairs greatly exceed the value they will confer on the ship, the assured may abandon, and claim a total loss? But it is said that the jury have no right to look at the circumstances that she was a *Dutch* ship, and that by the usages that prevail in *Holland* her value, when fully repaired, would nevertheless, in consequence of her disaster, be less than the amount of repairs. For the same reason, it might be contended that the jury ought to lay out of their consideration that she was not a *British* ship, and that therefore her value in *England*, when repaired, would be less than the cost of repairs, not being entitled to a register. The substantial fact is, that her value, when repaired, is less than the cost. The reason of the fact is, in the one case, the want of a *British* register; in the other, the usage of trade in *Holland*, which would prevent any body from giving a price for her equal to the repairs. Both these circumstances existed and affected the ship before the policy. Surely, if the question of her value when repaired be material, the jury may look at the reasons which are alleged to impair or increase the value. One witness says she would not sell in *London* for one-half the cost of repairing her: another says she would not sell for half the cost in *Holland*. If this evidence be admissible at all, may not the witnesses go on to allege the reasons of their opinion in both cases? Suppose that in giving evidence of her value the witnesses had proved that, for different reasons, peculiar severally to each maritime state in *Europe*,

but all existing at the time of the insurance, the ship, when repaired, could not have been sold at all, or could only have been sold for a price next to nothing: could it be gravely alleged that the jury could not take this into their consideration, because the underwriters know nothing of the laws or usages of other maritime nations besides their own? That proposition, viz: that the underwriters are not presumed to know the usages or laws of foreign states, has indeed been urged by the counsel for the plaintiff in error beyond what is consistent either with reason or practice. The underwriters upon *a foreign ship or a foreign voyage are presumed to know the usages and the laws which affect that ship or that voyage. But, if the proposition were true to any extent, it has no place in this argument; for the question is not about their knowledge, real or presumed, but a question about a fact which, whether they knew it or not, affects the value of the ship. If indeed the depreciated value of the ship had arisen from any circumstance occurring after the policy was effected, and wholly unconnected with the perils insured against, such as a new law or regulation affecting trade or shipping, the case would have presented a question well worthy of consideration, upon which, however, it is unnecessary to offer any opinion. Where such circumstances occur, it may be necessary to qualify the proposition that, if a prudent owner, uninsured, would not repair the vessel, it would be a total loss. But, as the case now stands, if the jury are to lay out of their consideration all the previous circumstances that may eventually affect the value of a *Dutch* ship, they must by the same rule disregard all the circumstances that may affect the value of a ship of any nation. By what criterion, then, are they to judge of the value of any ship? or how can they receive any evidence of the value at all, if they may not sift the grounds and reasons of the opinion of witnesses? The argument, pushed to its full extent, presents to them nothing but a ship capable of being repaired and put into as good a plight to swim as before, but abstracted from all the circumstances which are connected with her and which affect her value; and, consequently, instead of considering these circumstances, they ought, upon a question whether a prudent owner would repair, to turn their attention to no other circumstance but the cost of repairs, and the original value of the ship when insured. Whereas in *Milles* v. *Fletcher*, (*a*) Lord *Mansfield* says, 'If she had been repaired at *New York*, the expense might have exceeded what she would have sold for on her return to *London*.' This case, and all the others which *follow on the same subject, will be found to refer to the actual price of the ship when repaired, and not to her original value.

[*401]

[*402]

"There is one plain way of considering this question: If the underwriters had accepted the abandonment, would they have repaired the ship themselves, or would they not have taken into consideration that she was a foreign ship, and could not obtain a *British* register; and that she was a *Dutch* ship, and could not be advantageously sold in *Holland*, because, under the circumstances, the *Dutch* trading companies would not employ her; and, finally, that the exclusive laws of all other maritime states would affect her value in each? And if they necessarily would and must have considered all these things, which would have led them to sell the ship for 700*l*., rather than repair her, the assured and the jury are equally entitled to take them into their consideration."

Judgment affirmed.

And in the case of *Parry* v. *Aberdein*, (*b*) where a ship, having goods on board on which an insurance was effected, was placed in so much danger by perils of the sea, that the crew deserted her, in order to save their lives, and

(*a*) Doug. 235.

(*b*) 9 B. & C. 411.

the owners of the goods, upon receiving intelligence of this, gave notice of abandonment; a few days afterwards, however, the vessel was found by some fishermen, and towed into port and repaired, but the goods, which were of a perishable nature, had been so much injured by the salt water, that they would not have been worth anything if forwarded to their place of destination: it was held that the assured were entitled to recover for a total loss.

The assured cannot be allowed to turn a partial into a total loss.

This was shewn in the case of *Cazalet and others* v. *St. Barbe*, (*b*) it was an action on a policy of insurance upon the ship *Friendship*, from *Wyburg* to *Lynn*, subscribed by the defendant for 100*l.* at two guineas per cent. The defendant *pleaded a tender, and paid 48*l.* into Court. The cause [*403] was tried at *Guildhall*, before Mr. Justice *Buller*, when a case was reserved for the opinion of the Court, stating that the damages sustained by the ship in the voyage insured, did not exceed 48*l.* per cent., which sum the defendant had paid into Court. That when the ship arrived at the port of *Lynn* she was not worth repairing. The question for the opinion of the Court was, whether the plaintiffs had a right to abandon?

Mr. Justice *Willes*.—"The question is, whether, under these circumstances, the plaintiffs had a right to abandon, or, in other words, whether they can turn a partial into a total loss? The finding of the jury in this case determines the question, because it is expressly found that the damage did not exceed 48*l.* per cent. The case then states, that the ship was not worth repairing, but no mention is made of what was her real worth; so that the remaining materials of the ship, if sold, may make up the difference between 48*l.* and 100*l.* per cent. There has been no loss either of the ship or of the voyage; but, being an old ship, she suffered so much that she was not worth repairing. I cannot now determine that there was a total loss, when the jury have already said that there was only a loss of 48*l.* per cent. As to the case cited of *Bond* v. *Hunter*, (*a*) this question never occurred in it. The action was brought upon the homeward-bound policy, and it was sufficient to say, that that policy never attached, for the ship had received her death's wound in her outward-bound voyage. In the case of *Milles* v. *Fletcher*, a total end was put to the voyage. (*b*) In the other cases, the questions arose upon losses which had happened during the several voyages; here the voyage has been performed, and the ship is arrived; and after the jury have found that the damage sustained did not amount to more than 48*l.* per cent., the Court are precluded from saying it is a total loss."

Mr. Justice *Buller*.—"Nothing can be better established *than [*404] that the owner of a ship can only abandon in case of a total loss. The cases which have been cited went upon that ground. In the case of *Jenkins* v. *Mackenzie*, (*a*) though the ship was brought into port, yet the capture, as between the assurer and assured, was a total loss. But there is no instance where the owner can abandon, unless at some period or other of the voyage there has been a total loss. No such event has happened here; for the jury have expressly found, that the loss amounted only to 48*l.* per cent. Even allowing total loss to be a technical expression, yet the manner in which the plaintiff's counsel has stated it, is rather too broad. It has been said, that the insurance must be taken to be on the ship as well as on the voyage; but the true way of considering it is this: it is an insurance on the ship for the voyage. If either the ship, or the voyage be lost, that is a total loss; but here neither

---

(*b*) 1 T. R. 187.
(*a*) 1 T. R. 188, tried before Lord Mansfield at Guild. 1781.
(*b*) *Vide supra*, 374. (*a*) Brown's Ap. Ca. 141.

is lost. The case of *Hamilton* v. *Mendez* is decisive. Judgment for the defendant.

In another case of *Furneaux* v. *Bradley*, (*d*) an action was brought on a policy of insurance on the *Prince of Wales*, in port or at sea, for six months, from the 18th *July*, 1777. The ship in question was in government service, bound from *Cork* to *Quebec*. She arrived there, but the season being too far advanced before she was ready to return, she was removed into the basin: but, on the 19th *November*, she was driven from thence by a field of ice, and damaged by running on the rocks. The condition of the ship could not be examined till *April* following, after the expiration of the policy. She was then, however, found to be bulged and much injured, but not thought irreparably so. In the progress of the repair, difficulties arose for want of materials; and the captain, after consulting the merchants and agents in the country, sold her. An account was made up, charging the insurers with the whole amount, and crediting them with the sums for which the ship sold, as salvage.

[*405] Lord *Mansfield*, at the trial said:—"The great point in *the cause is, whether this is a total loss by this accident? It is a new question: upon which I shall reserve a case for the opinion of the Court." After argument by counsel on both sides, his Lordship said, the justice of the case seemed to be, that the loss in *November* should be taken as an average, not a total one; and that the whole Court were of opinion, that the ship should be considered as damaged on the 19th of *November*, but not totally lost.

In a subsequent case, *M'Masters* v. *Shoolbred*, (*a*) before Lord *Kenyon* at *Nisi Prius*, it was held in an action on a policy for six months, where the ship had been captured and carried into *Charlestown*, sold by the captors, by authority of the *French* consul there, and purchased by the captain on account of the original owners, that this was only to be considered as a partial loss, and that the owners could not abandon. Lord *Kenyon* being of opinion that the captain was agent for the owners, recovering the vessel upon their account, and paying a kind of salvage, the amount of which would be the loss sustained, and which only constituted an average loss. His Lordship, however, admitted, that when the ship had been captured and carried into port in the enemy's possession, the assured at that period might have abandoned. But not having done so till the vessel was recovered, they could now only go for an average loss.

So in *Fitzgerald* v. *Pole* (*b*) where a ship was insured for a cruise of four months, free from average, and upon a special verdict it appeared that while the ship was on her cruise, and within the four months, the crew mutinied against the captain and his officers, and by force carried the ship to *Jamaica*, and before her arrival there, by force seized the boat, fire-arms, and cutlasses, carried them off, and deserted the ship, whereby the voyage and cruise were lost for the remainder of the four months, but the ship arrived at *Jamaica*, though

[*406] not till after the end of the four months, *the Court of King's Bench held that the assured were entitled to recover; but this judgment was reversed in the Exchequer Chamber, and the House of Lords confirmed the judgment of reversal, for the insurer being by the terms of the policy free from all average, the assured could not be entitled to recover except for a total loss: and the ship being found by the special verdict to be in good safety at her proper port, at and after the end of the four months, for which the insurance was made there could be no loss.

(*d*) East, 20 Geo. 3. Park Ins. 365. (*a*) 1 Esp. 237.

(*b*) 5 Bro. Par. Ca. 131; Ambl. 214; and see a similar case of Wilson v. Foster, 6 Taunt. 25.

It has been settled in a case of *Manning* v. *Newnham*, (*d*) in what cases a loss shall be deemed to be total, after an accident by perils of the sea. A policy was effected in *London* upon the ship *Grace*, her "cargo and freight, at and from *Tortola* to *London*, warranted to depart on or before the 1st of *August*, 1781. The ship valued at 2,470*l*., the freight at 2,250*l*., and the cargo at 12,400*l*., at a premium of 25 guineas per cent., to return 10 per cent. if she depart the *West Indies* with convoy for *England* and arrives." At the head of the subscriptions is the following declaration, viz:—on ship, freight, and goods, warranted free of particular average. This ship, with her cargo, was a *Dutch* prize taken by a privateer of *Tortola*, and was there condemned: during the whole of her stay at *Tortola*, (four or five months,) she was never unloaded. On the 1st of *August* the whole fleet of merchantmen got under weigh, under the convoy of the *Cyclops*, *&c.*, but not being able to get clear of the islands that day, they cast anchor during the night, and the next day got clear of the islands. About 10 o'clock on the 2nd of *August*, several squalls of wind arose, which occasioned the ship to strain and make water so fast, that the crew were obliged to work both pumps; and, on the third, the captain made a signal of distress: in consequence of which she was obliged to return to *Tortola*, under protection of one of his Majesty's ships. The captain made his protest, and a survey was had, by which the ship was declared [*407] *unable to proceed to sea with her cargo, and that she could not be repaired in any of the *English* islands in the *West Indies:* and that many of the sugars in the bilge and lower tier were washed out, and several of the casks broke and in bad order. The ship and the whole of the cargo were sold accordingly at *Tortola*. The assured claimed a total loss of ship, cargo, and freight, which the jury thought right, and found accordingly. A motion was made for a new trial, which upon full consideration was refused.

Lord *Mansfield*, after stating the evidence, and that his prejudices at the trial were in favour of the underwriters, proceeded thus:—"But, notwithstanding this inclination of my opinion, upon full consideration we think the jury have done right. If by a peril insured the voyage is lost, it is a total loss: otherwise not. (*a*) In this case the ship has an irreparable hurt within the policy; this drives her back to *Tortola*, and there is no ship to be had there which could take the whole cargo on board. There were only two ships at *Tortola*, and both could not take in the cargo. To show how completely the voyage was lost, and that no ship could be got, the assured have not been able to send that part of the goods which they purchased forward to *London*. It is admitted there was a total loss on the freight, because the ship could not perform the voyage. The same argument applies to the ship and cargo. It is a contract of indemnity: and the insurance is that the ship shall come to *London*. Upon turning it in every view, we are of opinion that the voyage was totally lost, and that is the ground of our determination." The rule was discharged. (*b*)

This subject has been much considered and discussed; and the case of *Manning* v. *Newnham*, though not overturned, has received a considerable shake. In *Anderson* v. *Wallis*, (*c*) it was held that a mere retardation of a voyage; *where the insurance was on a cargo, not of a perishable nature, [*408] to another season, (the voyage being to *Quebec*) was not a ground of abandonment. (*a*)

(*d*) Trin. Term, 22 Geo. 3, Park Ins. 368.

(*a*) But see *post*, p. 409, per Lord Tenterden, in Doyle v. Dallas, 1 M. & R. 55.

(*b*) See Wilson v. Royal Exch. Comp. 2 Camp. 623.

(*c*) 2 M. & S. 240, *ante*, p. 359.

(*a*) In Hunt v. Royal Assurance Comp. 5 M. & S. 47, and *ante*, p. 358, it was held, that the loss of a voyage for a season was not a ground of abandonment where the cargo

But in the case of *Dixon* v. *Reid*, (*b*) where the cargo is taken out of the possession of the assured by the fraudulent and barratrous acts of the master and mariners, the loss is total and the assured may abandon. Thus in an action on a policy of insurance on the ship and cargo from *Sierra Leone* to a port of discharge in *Great Britain*. The ship sailed from *Sierra Leone* with two hundred and thirty-three logs of wood on board, on the 8th *March*, 1820, but was barratrously taken by the crew to *Barbadoes*, where she arrived on the 28th *April;* and the ship was condemned and sold, and forty-seven logs of timber were also sold, to pay the charges incurred there, and the remaining one hundred and eighty-six logs were sent home in another vessel. The assured abandoned to the underwriters. The question was, whether this was a total loss with benefit of salvage, or merely an average loss. For the underwriters, it was contended, that a loss of the voyage for a season by the perils of the sea, was not a ground of abandonment where the cargo was in safety: and the cases of *Anderson* v. *Wallis* and *Hunt* v. *Royal Exchange Assurance Company* were cited as authorities. But *Abbott*, C. J., said, "I am of opinion that this is a case of a total loss with benefit of salvage. The case is plainly distinguishable from the cases which have been cited in argument, where the ship has been driven out of her course by the perils of the sea, and the voyage thereby retarded. In these cases, the cargo was during the whole time in the possession of the assured. Here, by the fraudulent barratry of the master and [*409] mariners, the cargo was taken out of the *possession of the assured. From that time it became to them a total loss. The payment of the wages at *Barbadoes*, and the sending home the one hundred and eighty-six logs, were not the acts of the assured, or of any person authorized by them. I think, therefore, that this was a total, and not an average loss."

In the case of *Gardiner* v. *Salvador*, (*a*) which was an action on a policy of insurance, where a total loss by perils of the seas was alleged in the declaration, it was proved that the ship was driven by a current on a rock. The captain consulted with several persons, who were of opinion that it was impossible to get her off, and that the best course was for him to sell her as she lay, which he accordingly did. The purchaser succeeded in getting her off in five days, and the whole cost to him, including the price he paid for the stores, amounted to 750*l.* Her value, after the repairs, was stated to be 1,200*l.* *Bayley*, B., told the jury, "The question in this case is, whether you are satisfied there has been a total loss by perils of the seas. I know no such head of insurance law as loss by sale. If the situation of the ship be such, that by no means within the master's reach it can be treated so as to retain the character of a ship, then it is a total loss. If the captain, by means within his reach, can make an experiment to save it with a fair hope of restoring it to the character of a ship, he cannot by selling it turn it into a total loss." The defendants had a verdict.

In a recent case of *Doyle* v. *Dallas*, (*b*) tried before Lord *Tenterden*, at *Guildhall*, on a policy of insurance on the ship *Triton*, averring a total loss by perils of the sea, it appeared that the vessel, having been taken by a pilot to the inner roads at *Buenos Ayres*, and anchored there, struck upon an anchor, and, in spite of the efforts made to move her, ultimately sunk, and lay on her side, completely under water at high tide and partly under at low ebb. The

---

was in a state of safety and not of such a perishable nature as to make the loss of the voyage the loss of the commodity, although the ship be incapable of proceeding in her voyage; and see Barker v. Blakes, 9 East, 283.

(*b*) 5 B. & C. 597.

(*a*) 1 M. & Rob. 116, and see Tanner v. Bennett, R. & M. 182.

(*b*) 1 M. & Rob. 48.

cargo was almost entirely discharged. The ship was surveyed by some captains *of ships, approved of by the owner and by *Lloyd's* agent [*410] at *Buenos Ayres*, and they advised that she should be sold, on the ground that the expense of raising her would probably be greater than she was worth. She was therefore sold, and was ultimately got off by the purchaser, but at great expense. The value of the *Triton* before the accident was about 2,300*l.* or 3,000*l.*, the insured valued was 2,500*l.*; the expense of raising her and having her repaired amounted, in the whole, to about 1,350*l.* If she had been coppered (which she ought to have been in order to carry the cargo in question) she would have cost 300*l.* more. But, repaired as she had been, she might have sailed for *England* in ballast, or with some kind of a cargo; and she was in fact used by her owner as a coasting vessel at *Rio Janeiro*. On this state of facts, the plaintiff claimed to recover for a total loss; the defendant contended that it was an average loss only, and paid into Court a sum sufficient, as he alleged, to cover the amount.

Lord *Tenterden*, in summing up to the jury, said:—"The only question is, whether this amounts to a total loss? The ship is not bodily and specifically lost; but circumstances may have occurred which, according to the law established in cases of marine insurance, are equivalent to a total loss. I think the circumstances in this case will have that effect if at the time of the sale that measure, on the sound exercise of the best judgment, appeared most beneficial to all parties. It is not enough that the owner acted honestly in the sale, and intended to do for the best: the underwriters are not liable, unless he formed a correct judgment, that is to say the best and soundest judgment which could be formed under the circumstances which then existed. Nothing less than this will make a total loss, while the ship continues in existence." His Lordship, then, after referring to the evidence respecting the probability of raising the vessel, and of the expense of repairing her, proceeded thus:—"Besides this evidence of expense, it is proved that, after all these repairs, the ship was still unfit to sail for *England* with a cargo of hides—such a cargo as the plaintiff had contracted for. I do not think that *circumstance enough to justify the sale. The underwriters do not under- [*411] take that the ship shall be able to take this or that cargo. If the ship could have come to *England* even in ballast, I think, (certainly with any cargo) so that on her arrival she would have been worth the money expended on her, she ought to have been repaired for the purpose. The loss of the voyage will not, in my opinion, make a constructive total loss of the ship. Some cases have been so decided; but as the thing insured remained in specie, I do not think that amounted to a total loss. The best thing for the underwriters must be done not merely for the owner, and as they indemnify only against the loss of the ship, the loss of the voyage would not injure them. Taking all the circumstances into your consideration, if you are of opinion that the plaintiff, acting as he did, exercised a sound judgment as well for the benefit of the underwriters as for his own interest as owner, and did what at the time was best for all parties, your verdict will pass for the plaintiff: if otherwise, for the defendant." Verdict for the defendant. A motion was afterwards made for a new trial, which was refused.

The general convenience of making an abandonment, has led to an opinion that it is more necessary than it really is. A party is not, in any case, obliged to abandon, neither will the want of abandonment oust him of his claim for that which is an average or a total loss, as the case may be. Where there is an abandonment, the risk is thrown upon the underwriters; where there is no abandonment, the party takes the chance of recovering according to his actual loss. Without an abandonment, an average loss may be recovered: abandon-

ment is only necessary to make a constructive total loss. (*a*) But where the thing subsists in specie, and there is a chance of its recovery in order to make a total loss, there must be an abandonment. (*b*)

[*412] *The question as to the necessity of making an abandonment in certain cases in order to enable the assured to recover for a total loss, it has already been observed, has been the subject of many recent and important decisions, by which the law appears to be now quite settled. (*a*)

The case of *Mellish* v. *Andrews*, (*b*) and *Mullett* v. *Shedden*, (*c*) just referred to, fully support the doctrine that where there is a total destruction of the subject-matter of the insurance, no notice of abandonment is necessary.

So in the case of *Cambridge* v. *Anderton*, (*d*) which was tried before *Abbott*, C. J., at *Guildhall*, it appeared that the ship, which was insured from *Quebec* to *Bristol*, set sail from *Quebec*, and about two hundred and twenty miles below *Quebec*, got upon the rocks in the river *St. Lawrence* in foggy and tempestuous weather; she was there much injured, and surveyed by experienced persons, who gave it as their opinion, that the expense of getting her off (if it could be accomplished) and repairing her, would far exceed the value of her when repaired. Under these circumstances, the captain and the agents of the plaintiff sold the ship with her certificate of registry. The purchaser did succeed in getting her off, took her back to *Quebec*, and repaired her; she afterwards sailed on a voyage to *England*, but was lost in the *Gulf of St. Lawrence;* the plaintiff never gave any notice of abandonment to the underwriters. The Lord Chief Justice told the jury that if, under the circumstances in evidence, they thought that the ship was not repairable at all, or that when repaired, she would not be worth the expense of doing the repairs, the plaintiff was entitled to recover for a total loss, but that otherwise they could claim for an average loss only. The jury found a verdict for a total loss. Upon a motion for a new trial, *Abbott*, C. J., said, "If the subject-matter of the insurance remained a ship, it was not a total loss, but if it was reduced to a mere congeries of

[*413] planks, the vessel was a *mere wreck, the name which you think fit to apply to it cannot alter the nature of the thing." (*a*)

And the same learned Judge expresses himself in nearly the same terms in the case of *Allen* v. *Sugrue*, (*b*) which was an action of a policy of insurance on a ship valued at 2,000*l.*, and averring a total loss by perils of the sea. The ship had been stranded at the entrance of the *Hull* dock; it was proved that it would have cost 1,450*l.* to have repaired her, and when repaired, she would not have been worth that sum. It was contended for the defendants, that the plaintiff could not recover for a total loss, as in that case they would receive 2,000*l.*, whereas the expense of repairing the damage would not be more than 1,450*l.*, and that as the defendant had paid sufficient into Court to recover that sum, the plaintiff should be nonsuited. On the rule *nisi*, Lord *Tenterden* thus expresses himself, "I am of opinion that the question whether the loss sustained is an average or a total loss, is precisely the same when the value of the ship has been mentioned in the policy, and when that has been left open. If the value has not been mentioned, it must be ascertained by evidence; if it has been mentioned, then all further inquiry is unnecessary, as the parties have

---

(*a*) By Lord Ellenborough in Mellish v. Andrews, 15 East, 14, and in Mullett v. Shedden, 13 East, 309.

(*b*) By Lord Ellenborough in Tunno v. Edwards, 12 East, 491.

(*a*) See the judgment in Roux v. Salvador, 4 Scott, p. 32, and *ante*, pp. 149, 353, 355, of this Treatise.

(*b*) 15 East, 13.

(*c*) 13 East, 304.

(*d*) 2 B. & C. 691.

(*a*) And see Robertson v. Clarke, 1 Bing. 445.

(*b*) 8 B. & C. 561.

agreed as to what shall, in the event of loss, be considered the value. If underwriters find, by experience, the practice of entering into valued policies is injurious to them, they may very easily avoid it for the future. Then was this a total loss? The jury have found that the ship was so much damaged as not to be worth repairing, or in other words, that although the materials of the ship remained, the ship itself did not. That in my mind constitutes a total loss, and it would be strange if this were otherwise, for the ship ceased to exist for all useful purposes as a ship. A total loss of the ship, therefore, ought to be paid for, and that is the sum agreed upon as the estimated value of the ship, minus the value of the materials saved."*

The case of *Hadkinson* v. *Robinson*, (*c*) which is a leading [*414] *case on the subject, is deserving of being mentioned. It was an action on a policy of insurance on pilchards, on board the *Paxora*, at and from

---

* *Case of Manning and another* v. *Irving* (*a*).—A policy was effected in June, 1843, upon a ship (originally built for the East India Company's service) valued at 17,500*l.* at and from China to Madras, and back to China. The vessel was purchased by the plaintiffs in 1839 for 11,000*l.* During the voyage, the vessel was, by a peril insured against, dismasted; and by the wreck of the masts and rigging falling over the ship's sides and striking under her hull, her copper and sheathing were much injured. The necessary expenditure to repair the damages so sustained by the ship, and to refit her masts, sails and spars, rigging, and sheathing, &c., so as to render her seaworthy for the voyage insured, would have amounted to not less than 10,500*l.*; and, if such expenditure had been incurred, the ship would have been worth a sum not exceeding 9,000*l.* During the hurricane the vessel made no more water than usual; and, upon examination of the ship at Calcutta, the hull did not appear to be injured, and the ship appeared to be sound in all other respects than those above mentioned. Held, upon a special case reserved, that the underwriters were liable as for a total loss.

This was an action of assumpsit brought by the plaintiffs, managing owners of a vessel called the General Kyd, against the defendant, one of the directors and chairman of the Alliance Marine Insurance Company, under the provisions of an act of Parliament, making the company liable to be sued in the name of their chairman. The first count was upon a policy of insurance for 3,000*l.*, duly subscribed on behalf of the company upon ship valued at 17,500*l.*, at and from China to Madras, while there, and back to China, not east of Hong Kong, with leave to call at the Straits; and averred a loss by perils of the sea. The second count was for money paid, the third for money had and received, the fourth for interest, the fifth on an account stated. The defendant pleaded to the first count, that the vessel was not wholly lost, in manner and form, &c., and to the last four non assumpsit; upon both of which pleas issue was joined.

At the trial, before Cresswell, J., at Guildhall, at the Sittings after Trinity Term, 1844, a verdict was found for the plaintiffs, damages 3,000*l.*, subject to the following case:—

The plaintiff's vessel, the General Kyd, of 1318 tons, had been originally built for, and employed in, the trade of the East India Company, whilst the Company retained its trading privileges, and had been built at a very great expense; and in consequence of the Company ceasing to trade, upon the alteration of their charter, the General Kyd, and all other ships of the same class, ceased to be in demand.

The plaintiffs purchased the vessel in 1839, for 11,000*l.*

The policy in question was effected by the plaintiffs in June, 1843; and at that time, according to advices from the purser of the ship, then in China, the cost of the vessel to them, including, however, wages and other matters not constituting part of the permanent value of the ship, amounted to 17,500*l.*, the value in the policy.

No insurance was effected by the plaintiffs on the freight of the said ship on the voyage insured.

The vessel, upon former voyages, had been frequently insured at the same or a higher valuation, and was known to the defendants to have been in the service of the East India Company.

The ship sailed on the voyage insured, from Singapore, on the 25th of April, 1843, and in the course of such voyage arrived in the Madras Roads upon the 18th of May following,

---

(*a*) 1 Common Bench R. 168. (*c*) 3 Bos. & Pull. 388.

Mount's Bay, in *Cornwall*, to *Naples*, with leave to join the convoy at *Naples* or elsewhere. The policy contained the usual memorandum, exempting the underwriter from average losses on fish, &c., unless general, or the ship be stranded. The declaration stated the loss to be, "that after the loading of the

---

for the purpose of taking in a cargo of cotton, which was purchased and provided for shipment on behalf of her owners.

On the 21st of May, 1843, whilst so lying in the Madras Roads, the vessel was carried out to sea in ballast by a violent hurricane; and on the following day, during the gale, and whilst still at sea, she was dismasted, and by the wreck of the masts, sails, and rigging falling over the ship's sides, and getting and striking under the hull, the copper and wood sheathing on the bottom of the vessel was much injured.

In order to save the vessel, and for the preservation of the crew, she was necessarily carried into Calcutta.

The necessary expenditure to repair the damages sustained by the ship, and to refit her masts, sails, and spars, rigging, copper and wood sheathing, and other things, so as to render her seaworthy for the voyage in question, would have amounted to a sum of not less than 10,500*l.*

If such expenditure had been incurred, the ship would have been worth (either in England or Calcutta) a sum not exceeding 9,000*l.*; and such would have been her marketable value if put up for sale in that state of repair, either at the period of effecting the policy, or just before the damage, or at the time at which the repairs would have been completed.

During the hurricane the vessel made no more water than usual; and, upon examination of the ship at Calcutta, the hull did not appear to be injured, and the ship appeared to be sound in all other respects than those above mentioned.

The vessel, upon her arrival in Calcutta, was put into dock for survey and examination. She was surveyed four times, on the several dates following:—2nd of June, 9th of June, 3rd of July, and 7th of July, 1843.

Upon the survey held on the 2nd of June, the surveyors recommended that the vessel should be docked for further examination, and in the meantime spars should be procured for masts, yards, &c., on the most reasonable terms; also that estimates should be obtained from the various ship-chandlers and others for the supply of the stores required to replace the General Kyd in the same position as before the hurricane.

Upon the survey held on the 3rd of July, 1843, the surveyors recommended the copper and sheathing to be stripped off the bottom, and that it should be dubbed down bright from the gunwale to the keel, to ascertain whether or not the ship had received any further injury in her bottom from the wreck of the masts.

Upon the survey held on the 7th of July, 1843, the surveyor reported that the ship had experienced very severe weather, having been blown out of the Madras Roads, after which she encountered one of those violent gales of wind, or hurricanes, which prevail in the Bay of Bengal during the month of May, which reduced the hull to a complete wreck, the main-mast and mizen-mast breaking off below the hounds, the fore-mast and bowsprit badly sprung; in fact so crippled was the ship in masts and yards as to require nearly the whole of them to be renewed; that the examination of the hull which he had been enabled to make on the upper deck, gun or middle deck, orlop, and hold, shewed that the said ship had not worked on her fastenings; that the closeness of all the butts, scarples, and edges of the planks, shewed not the slightest movement; and that the beam-ends, knees, and bolts seemed to be nearly in the same state as when first forged and fastened; that equally so was the hull on the outside, as regarded the topsides and wales; and that, judging from the bottom plank, where the copper and sheathing had been torn off by the wreck of the masts, the seams were in a most perfect state; that the keel of the said ship was remarkably straight for a vessel of her age, having only four inches camber in thirty feet from the fore post; that aft, from that length to the stern post, it formed nearly a horizontal; a similar sized ship built in Europe of oak and fir, tree-nailed fastened, would in all probability, when from twelve to fifteen years old, have cambered fifteen to eighteen inches. The blocks were not cut into, which shewed that the keel had not moved since the said ship was docked.

The said last-mentioned surveyor recommended that the bottom of the said ship should be stripped, the copper and sheathing being much injured by the masts, thoroughly overhauled, dubbed bright, and if it proved, as he expected, free from decay, it should be well caulked, felted, sheathed, and coppered; that the channels and chain-plates should be partly renewed and repaired; that the masts and yards should be completed, and the wales, topsides, and decks caulked, with sundry trifling jobs to be done about the hull; after which

said pilchards on board, &c. the said ship or vessel with the pilchards, &c., &c., departed and set sail from the said port of *Penzance* aforesaid, on her said intended voyage in the said writing and policy of insurance mentioned, and afterwards, and whilst the said ship was so sailing and proceeding on her said

---

the said last-mentioned surveyor reported that the said ship, as regarded hull, masts, and yards, would be fit for sea, and a good sea risk to any part of the world.

The said ship was built at Calcutta about thirty years before that time, of the best materials, and was most expensively fastened with copper from the keel to the wales, and in the upper works with iron.

Estimates were procured after the surveys, of the costs of the necessary repairs and refittings, to render the ship seaworthy as before mentioned; and such cost would have amounted to the sum before mentioned.

After such repairs the vessel would not have been a worse ship than before, unless it had been discovered in the course of such repairs that the vessel had received any further injury in her bottom from the wreck of the masts. Some materials for repairing the vessel were procured by the master, and some repairs were commenced, but were afterwards discontinued. Those repairs were principally for the purpose of protecting the vessel from sustaining additional damage; and masts, spars, sails, and other articles were also purchased for the purpose of proceeding to effective repairs.

On the 10th of October, 1843, on receipt of information of the extent of damage and repairs required, (as stated in the surveys and estimates) an abandonment of the vessel was duly made to the underwriters, which the underwriters refused to accept.

The vessel has not since been repaired.

The question for the opinion of the Court is, whether, under the circumstances, the defendants were liable as for a total loss. If the Court shall be of that opinion, interest is to be added to the amount, if the Court shall be pleased to put itself in the situation of a jury, and shall think it fit that interest should be allowed. If the Court shall be of opinion that the loss was an average loss, and not a total loss, the verdict is to be entered for an amount of damages to be estimated out of Court, in a mode agreed upon between the parties. Either party is to be at liberty, upon the argument, to refer to the pleadings, and, with the permission of the Court, to turn the case into a special verdict.

Sir T. Wilde, Serjeant, (with whom was Greenwood,) for the plaintiffs. (*a*) Upon the facts stated in the special case, the defendants are liable as for a total loss. It appears that, in the course of the voyage, the vessel, by a peril insured against, sustained damage to such an extent, that she was no longer capable of being used as a ship without an outlay of 10,500*l.*, which would exceed by 1,500*l.* her value when repaired. It has been so repeatedly decided that the underwriters are liable as for a total loss, where the vessel is by perils of the sea reduced to such a state as to be no longer available as a ship but at an expense which no prudent owner, if uninsured, would incur, that it would be idle to argue the point in a Court of co-ordinate jurisdiction. The principal case upon the subject is that of Allen v. Sugrue, (*b*) to which may be added Young v. Turing. (*c*) Nor does the circumstance of the value being stated in the policy make any difference: the cases of Allen v. Sugrue and Young v. Turing both arose upon valued policies. [Maule, J.—"The value stated in the policy can have no bearing on the question."] The Court called upon

Channell, Serjeant, (with whom was L. J. Brown,) for the defendant. Admitting the force of the decisions adverted to, the defendant is desirous of reviewing them before a Court of error. [Creswell, J., referred to Cambridge v. Anderton, (*d*) and Sir T. Wilde to Read v. Bonham, (*e*) as authorities for the same position.] In Allen v. Sugrue, the vessel, which was valued in the policy at 2,000*l.*, received damage by perils of the sea, which could have been repaired for 1,450*l.*; but the jury found that she was not worth repairing; and it was held that this was a total loss, and that the assured were entitled to recover the sum at which

---

(*a*) The plaintiff's point (more general than the statement of the question at the conclusion of the case) marked for argument was, "that, under the circumstances set forth in the case, there was a total loss, and that the defendant was liable upon the policy effected with the company as for a total loss."

(*b*) 8 B. & C. 561; 3 Mann. & R. 9. *Ante*, p. 413.

(*c*) 2 Mann. & Gr. 593; 2 Scott, N. R. 752. *Ante*, p. 397.

(*d*) 2 B. & C. 691; 4 D. & R. 203; R. & M. 60; 1 C. & P. 213. *Ante*, p. 412.

(*e*) 3 Brod. & Bingh. 147; 6 J. B. Moore, 397.

voyage, and before her arrival at *Naples*, to wit, on, &c., the port of *Naples*, aforesaid, was, by the persons exercising the powers of government in the kingdom of *Naples*, shut against all ships the property of any of the subjects of our Lord the King, or sailing under the colours of our Lord the King, and against all merchandise, the property of any such subjects, carried in such ships, under the pain of such ships and merchandise being confiscated by the persons exercising the powers of government in the kingdom of *Naples*, whereby the said ship, with the said pilchards on board, (the said ship being then and there the property of subjects of our Lord the now King, and sailing under the colours of our Lord the now King, and the pilchards being then and there the property of the plaintiff, who was then and there a subject of our Lord the now King,) was then and there prevented from pursuing her voyage to *Naples* aforesaid, and the voyage was thereby then and there wholly defeated and lost, and the pilchards then and there became of no value to the plaintiff." At the

---

the vessel was valued in the policy. And in Young v. Turing, the ship Eliza, (Dutch built) valued at 8,000*l.* was insured at and from Rotterdam to Java and Sumatra, and back again to a port in Holland; in the course of her voyage she was stranded on the Goodwin Sands, and plundered; she was afterwards removed, and ultimately brought to London, and notice of abandonment given to the underwriters: it appeared, that just before the Eliza was cast away, she was worth 5,833*l.*; that her value as she lay was 700*l.*; and that the salvage was 420*l.*; it was proved by English witnesses that the expenses of repairing the ship in England would be 4,615*l.*; that if she had been entitled to a British register, she would have been worth, when repaired, from 4,500*l.* to 4,700*l.*; and that, if she had been a British ship, it would have been prudent for a British owner to repair her: it was proved by Dutch witnesses, that the expense of repairing her in Holland would have been far greater, and that her value when repaired in Holland would not have exceeded 2,915*l.*: it was also proved that the trading companies in Holland will not employ a vessel that has been stranded in the manner in which the Eliza was stranded, however perfectly she may have been repaired, and that this circumstance would affect her value in Holland. The Judge, in his summing up, told the jury that, in considering whether this was the case of a partial or a total loss, they ought not to take into account the value in the policy; and that, in considering the same question, they ought to look at all the circumstances attending the ship, and to judge whether, under all those circumstances, a prudent owner, if uninsured, would have declined to repair the ship; and, if so, they might find it a case of total loss. Upon a bill of exceptions tendered, this direction was held to be correct. In the present case, the Court is asked to decline to infer from the facts stated, that a prudent owner, if uninsured, would not have repaired the vessel. It appears that the ship was dismasted in a hurricane, and that, though somewhat damaged in her sheathing, her hull was altogether uninjured; and that the expense of repairing her would exceed, by 1,500*l.*, her marketable value when repaired. But it also appears that the plaintiffs had bought her for 11,000*l.* And it may be that a vessel is worth more to her owners than her mere market value. It is also to be observed, that the plaintiffs themselves have invariably treated her as worth more than 10,500*l.*: and she was valued in the policy at 17,500*l.*, at which, or a higher value, she had frequently before been insured. There is no suggestion by any surveyor that it would not have been prudent to repair her. [Cresswell, J.—"The question is, not whether or not the plaintiffs would, if uninsured, have repaired her, but whether a prudent owner would have done so, abstractedly from any particular fancy. Now, a prudent owner could hardly be expected to lay out 10,500*l.* to get a ship worth only 9,000*l.*"] In Young v. Taring the peculiar position of the assured was taken into account. So, here, taking the peculiar character of this ship into consideration, the Court will draw such inference as they may think reasonable. [Maule, J.—"It is a common course in special cases to provide that the Court shall be at liberty to draw such inferences from the facts stated as the jury might have drawn; and that perhaps somewhat enlarges their power. But I apprehend that the Court may in all cases draw such inferences as are reasonable, and obviously arise out of the facts that are stated. No person at all acquainted with the doctrine of Allen v. Sugrue could hesitate to pronounce this a case of total loss."]

Per Curiam. There can be no doubt that this case falls within the principle of those that have been adverted to; and, consequently, the plaintiffs must have judgment. Judgment for the plaintiffs.

trial before Lord *Alvanley*, it appeared, amongst the other facts, that after this vessel sailed from *Lisbon*, in the prosecution of her voyage, she received intelligence that *English* vessels were excluded from all the ports of *Naples*; and that afterwards the commander of the convoy ordered that all vessels destined for *Naples* or *Sicily* were to proceed to *Port Mahon*, *where the report respecting the state of the ports of *Naples* was confirmed. [*415] That in consequence of this a survey of the cargo was taken, under the direction of the Vice Admiralty Court of *Minorca*, and sold there for a small sum of money. The assured abandoned to the underwriters, who refused to accept it. The jury found a verdict for the underwriters, to set aside which a motion was made in the following Term. After argument at the Bar and time taken to deliberate,

Lord *Alvanley* delivered the judgment of the Court, confirming the verdict of the jury. His Lordship said,—"The question is, whether the circumstances which have happened amount to a total loss within the policy? The policy includes capture and detention of princes; and any loss which necessarily arises from such acts is a loss within the policy. But it has appeared to me that, where underwriters have insured against capture and restraint of princes, and the captain learning that, if he entered the port of his destination, the vessel will be lost by confiscation, avoids that port, whereby the object of the voyage is defeated, such circumstances do not amount to a peril operating to the destruction of the thing insured. If they could, the same principle would have applied in case information had been received at *Falmouth* that the ship could not safely proceed to *Naples*. In *Goss* v. *Withers*, *Hamilton* v. *Mendez*, and *Milles* v. *Fletcher*, the principles by which a total loss is to be ascertained are clearly laid down. It is there said, 'That, if the voyage be lost or not worth pursuing, if the salvage be high, if further expense be necessary, if the insurer will not at all events undertake to bear that expense, &c., the insured may abandon, notwithstanding a recapture.' But the doctrine thus laid down is only applicable to cases in which the loss is occasioned by a peril insured against, which, as it appears to me, must be a peril acting upon the subject immediately, and not circuitously, as in the present case. Without entering, therefore, into the question which has arisen in another case, (*a*) I think that the detention of the cargo on board the *ship in a neutral port, in consequence of the danger of entering the port of destination, cannot create a total loss within the meaning of the policy, because it does not arise from a peril insured against. This is an insurance upon an article from *England* to *Naples*, warranted free from particular average. The plaintiff, therefore, cannot recover, unless the article be totally lost by a peril within the policy, and such peril must, as I think, act directly and not collaterally upon the thing insured. I much doubt whether, if a verdict had been found for the plaintiff, judgment might not have been arrested. With respect to the case of *Manning* v. *Newnham*, it may be observed that Lord *Mansfield* expressly decides it upon the ground of the voyage being lost by one of the perils insured against, namely, by tempestuous weather. The words of Lord *Kenyon*, in the case of *M'Andrews* v. *Vaughan*, in which he lays down, that the insured may recover for a total loss, if the voyage be lost, must be taken with reference to the case before him, in which the injury arose from capture. The case of *Cocking* v. *Fraser* (*b*) is an extremely strong authority to show that, if the article insured (being one of those mentioned in the memorandum) [*416]

(*a*) See Dyson v. Rowcroft, *post*, 3 B. & P. 474; and see Naylor v. Taylor, 9 B. & C. 718, *ante*, p. 393.

(*b*) R. R. 25 Geo. 3. Park Ins. 247, *post*.

remain in specie, the assured cannot recover, though it be rendered totally useless, and never reach the port of destination. But that case did not involve the question on which this case turns, namely, whether the loss was occasioned by a risk within the policy. Here, without entering into the question how far the cargo was totally lost, the claim made by the assured arises from the ship not proceeding to that port to which she was destined. Had she proceeded to *Naples*, the loss insured against might have arisen. If we were to decide that the sale at *Port Mahon* was a total loss within the policy, it would afford to owners insuring cargoes of the description specified in the memorandum the opportunity of creating imaginary dangers whenever the cargo was not likely to reach the port of destination in a sound state, and by giving notice [*417] *of abandonment to throw a loss upon the underwriters, to which they are not liable by the terms of the policy. We are of opinion the verdict was right." (*a*)

A decision, upon similar principles, was made by Lord *Ellenborough*, in the following case of *Blanckenhagen* v. *London Assurance Company*. (*b*) The insurance was on goods on the ship *William*, at and from *London* to *Revel*. The ship sailed from the *Nore*, under convoy of the *Forrester* sloop of war, for the *Sound*, and arrived there on the 27th *October*, 1807. The ship proceeded from thence towards *Revel*, on the 15th of *November*, under convoy of the *Garnett* sloop of war. On the 17th of *November*, whilst the ship was proceeding on her voyage with the convoy, it became known to the convoy that an embargo was laid on all *British* ships in *Russian* ports; and in consequence thereof, the ship, under the orders of the convoy, returned to *Copenhagen* roads on the 18th of the same month. The ship *William*, together with the convoy, afterwards proceeded to lay off *Gottenburgh*, a *Swedish* port, for six days; and the ship insured might have gone into that port, if the captain had so thought fit, *Sweden* being then at war with *Russia*, but in amity with this kingdom. The ship sailed from off *Gottenburgh* the 30th of *November*, 1807, with the *Garnett* and fleet for *England*, with the additional convoy of the *Spitfire* sloop of war. The ship *William* was last seen on the 3rd of *December*, 1807, distant ten leagues from the *Naze of Norway*, when the sea ran high; and not having been since heard of, she was admitted to be lost. Hostilities between this country and *Russia* commenced on the 18th of *December*, and between this country and *Denmark* in the preceding *September*.

[*418] *Lord *Ellenborough* told the jury that this was a contract for the voyage out, and that although a ship from necessity might be allowed to take a circuitous course, yet the ultimate point of destination must ever be the same. That such a necessity might, perhaps, even justify a return to *England*, if it could be proved satisfactorily that it was the intention of the parties to seize the first favourable opportunity of returning to *Revel*. No such evidence appears in the present case. Neither does it appear that the convoy compelled the return to *England:* for, although the first part of the case states that the return to *Copenhagen* roads was under the orders of convoy, the return to *England* is not averred to be under such compulsion; I must, therefore, take this to be a voluntary abandonment of the voyage. At all events, even if there had been an intention to return to *Revel*, war intervened before such an

---

(*a*) See, however, the case of Barker v. Blakes, 9 East, 283; and see the cases of Lubbock v. Rowcroft, 5 Esq. 50. Parkin v. Tunno, 11 East, 22. Forster v. Christie, 11 East, 25, where the Court held, that on the authority of Hadkinson v. Robinson, where a loss was attributable merely to the fear of a hostile embargo at the port of destination, this was not a loss by the arrest or detention of kings.

(*b*) Sitt. before Mich. 1 Camp. 454.

intention could be executed, and that would put an end to the contract. The plaintiff was nonsuited.

Another action, *Brown* v. *Vigne*, (*a*) was brought in the Common Pleas on this policy, and Sir *James Mansfield*, then Chief Justice, concurred with Lord *Ellenborough;* and his judgment was afterwards confirmed by the whole Court. And where a ship was insured to her last port of discharge, in the river *Plata*, and the master, hearing that *Buenos Ayres*, where he meant to discharge his cargo, was in the hands of the enemy, went to *Monte Video*, and began to discharge the cargo there; this was held to be her last port of discharge, and therefore the underwriters were not liable for a loss, after the vessel had been moored twenty-four hours.

And in a case of *Doyle* v. *Powell*, (*b*) in which goods and freight were insured "at and from *Liverpool* to *Monte Video* and *Buenos Ayres*, if open, or the ship's final port of discharge in the river *Plata*, with liberty to wait two months at *Monte Video*, if needful, at a premium of five guineas per *cent. to return two per cent. for risk, ending at *Monte Video* on arrival," the ship arrived on the 2nd of *August* at *Monte Video*, which was then blockaded by an enemy's fleet, to prevent vessels passing to *Buenos Ayres*. The blockade did not cease till the 4th of *October*. The vessel afterwards sailed for *Buenos Ayres*, and was lost. The Court held that the risk was at an end when the vessel had stayed more than two months at *Monte Video*, and as the loss happened subsequently to that time, the underwriters were discharged.

[*419]

Mr. Justice *Park*, towards the conclusion of his chapter (*c*) on abandonment, says, that the effect of it is necessarily apparent, namely, "that, when the assured claimed a total loss, he must cede or abandon whatever is saved or whatever may be recovered to the underwriter, and who, when the transfer is made to him, stands in the place of the assured, and thus, by the transfer, becoming entitled to all the benefit and advantage which the assured himself could have claimed if his property had been uninsured. But the very peculiar circumstances which in many cases occurred during the two last wars, have led to a variety of discussions upon this subject. Amongst others, the late Emperor (*Paul*) of *Russia*, having, in the month of *November*, 1800, laid an embargo on all *British* shipping then in the *Russian* ports, most of which, being then laden for their homeward voyage, he compelled to unload, and having again taken off the embargo in *May*, 1801, and allowed the same cargo to be reloaded, and sent to *England*, a considerable question arose between the two sets of underwriters on ships and freight. The owners had often insured the ships with one set of underwriters, the freight with another; and in *February*, 1801, when the news of this embargo reached *England*, losses to a considerable amount were paid, the assured abandoning the ships to the underwriters on ships, the freight to the underwriters on freight. But afterwards, when the embargo was taken off, when the ships arrived, and the freights were earned and paid to the *owners, the question was, whether the abandonment of the ship conveyed to the insurer on ship the freight she had earned, or whether it went to the underwriter on freight, to whom also an abandonment had been made."

[*420]

In *France*, no difficulty could well arise upon such a subject, because insurances on ship and freight are not known as distinct subjects of insurance. (*d*) But that not being the case in *England*, and the question being of considerable

(*a*) 12 East, 283. See Naylor v. Taylor, 9 B. & C. 716; *ante*, p. 393.
(*b*) 4 B. & Ad. 267.
(*c*) Park Ins. 385.
(*d*) 2 Emerigon, 221.

difficulty, and, in point of value, of great magnitude, it has been the subject of much discussion. In the first case which came before the Court, in which there had been separate insurances upon the ship and freight, and an abandonment to the respective underwriters, and where the ship afterwards performed her voyage and earned freight, the real question as to the effect on the accruing freight by an abandonment to the underwriters on ship was not the subject of discussion, the Court looking merely to the express undertaking of the assured to the underwriters on freight by abandonment, held them liable for the amount, after deducting the expenses of earning it, but they guardedly abstained from expressing an opinion respecting the relative rights of the two sets of underwriters. The question, however, at last came fully before the Court in the case of *Case* v. *Davidson*, (*b*) to which we shall presently refer, and in which the Court held that an abandonment to the underwriters on ship transfers to them, as an incident, the freight which the ship may subsequently earn, although a separate insurance may have been effected on the freight by other underwriters, and abandoned to them by the owners.

The first in order was the case of *Thompson* v. *Rowcroft*, (*c*) in an action by the underwriter on freight against the owner of the ship. His declaration stated, that the defendant was owner of three-fourths of the ship *Thesus*, which had been chartered by him to one *Sanders*, to proceed to *Riga* for a quantity [*421] of masts, and to return therewith to *Portsmouth*, for which certain freight was to be paid. That the defendant caused the freight to be insured, and that the plaintiff subscribed the policy for 150*l.* That the ship arrived at *Riga*, was there loaded, and had nearly completed her cargo, when, in *November*, 1800, the ship was arrested, restrained, and detained by the *Russian* government, at *Riga*, and the cargo was unladen and kept under the authority of the same government; and that, on the 11th *February* 1801, upon intelligence of the loss arriving in *London*, the defendant applied to the plaintiff, and the other underwriters on freight, requiring them to pay a total loss, and abandoning to them their interest in the freight insured. The declaration then stated, that, in consideration of the premises, and that such payment of the loss should be made within one month, defendant promised, on such payment being made, to assign all right of recovery and compensation of and in the freight to one W. D. and the plaintiff, in proper form, for the benefit of the underwriters. That payment of the loss was duly made to the defendant: that afterwards, in *May* 1801, the arrest, &c. of the said ship was withdrawn by the *Russian* government, and the ship and cargo liberated, and the cargo put on board the ship, and the said ship proceeded to *Portsmouth*, and delivered her cargo to *S. Sanders;* and the defendant thereupon received the freight of the same to the amount of 1,857*l.*, and that the plaintiff's interest therein was 150*l.*, yet that the defendant had not made any assignment for the benefit of the underwriters on freight. The cause was tried before Lord *Ellenborough*, when a verdict was found for the plaintiff, subject to the opinion of the Court on a case, which stated the preceding facts, and also that the ship had been insured; and that, on hearing of what had passed in *Russia*, the respective underwriters paid their total losses, and the following indorsements were made on the policies. That on the ship was in these words: "Agreed to settle a total loss of 100*l.* per cent., the ship being detained and seized at *Riga*, and the owners to account to the underwriters for the ship, if restored to or [*422] received by them, or to make at the expense *of the underwriters, a proper assignment of their interest, in proportion to the sums insured. *London*, 19th *January*, 1801." And on that on the freight, "the

(*b*) 5 M. & S. 79.

(*c*) 4 East, 34.

interest in the freight insured by this policy being abandoned to the underwriters, as far as their subscriptions on the same, and payment of the loss being agreed to be made in one month, as customary, it is agreed, on such payment being made, to assign all right of recovery, compensation, &c. to H. T., W. D., and T. R., for the benefit of," &c. And the defendant signed the following agreement: "In consideration of the underwriters having accepted an abandonment of the ship *Thesus*, &c., and having agreed to pay a total loss thereon, I do hereby promise, on payment of the same, to make over to them or their assigns, at their expense, an assignment, in a reasonable and proper form, of their interest and proportion of the same. *Thomas Rowcroft.*" No assignment has been executed either of ship or freight. The defendant has received the freight, and has been called upon by the plaintiff to make an assignment for his benefit according to the above-mentioned indorsement on the policy on freight: but the underwriters on the ship insist that they are entitled to the freight, and have given the defendant notice of such claim; and he therefore does not think himself justified in paying the plaintiff without the sanction of the Court.

It is observable from this statement that the intention of the parties here was to procure a decision of the Court upon the general question, whether the underwriters on ship or freight were entitled to what may be deemed the salvage on the freight: and it was so considered at the Bar on the first argument, treating the defendant as a mere stakeholder, and the question as being in truth between the underwriters on the ship and those on the freight. But at the recommendation of the Court, the second argument was narrowed to the consideration of the question upon the specific agreement between the plaintiff and the defendant: and on this ground alone the case was ultimately decided. The defendant's counsel were of course to contend as to the general question, that *the underwriters on ship were entitled to the earnings of the ship: [*423] but

Lord *Ellenborough* said,—"If the rights of the respective sets of underwriters on the ships and on the freight clashed in this case, and if it had been a question of priority between the two, who were litigating for payment out of the same fund, I should have gone with the defendant's counsel in a great part of their argument; but here the litigation is by one of the sets of the underwriters with the assured, who has made a specific contract with each of them, by which he must be bound. And therefore, in my present view of the subject, the right of property in the subject-matter may be in the underwriters on the ship, and yet the defendant may be liable to the underwriter on the freight in this action. The plaintiff contracted with the defendant to insure his freight; an event happened which entitled him to abandon it to the plaintiff; the plaintiff accepted the abandonment, and has paid the defendant as for a total loss of the freight. The defendant has since received the freight; and yet he refuses to pay it over to the plaintiff in pursuance of his undertaking. To be sure he is liable." Judgment for the plaintiff.

In the very same Term, a special case, *Leatham, Executor* v. *Terry*, (*a*) the facts of which were substantially the same, received a similar decision. The declaration in that case was merely for money had and received to the use of the plaintiff's testator, who had been an underwriter on freight of the ship *Manchester*. The Court took time to consider of the point, and then Lord *Alvanley* said,—"we have inquired into the circumstances of the case lately decided (*Thompson* v. *Rowcroft*) in the King's Bench, upon the same subject, and find they do not materially differ from the present. Here the assured, in

(*a*) Trin. 43 Geo. 3, 3 B. & P. 479.

consideration of being paid for a total loss upon the ship, agreed to assign over
[*424] all their right and interest in the ship: after which they agreed with *the underwriters on freight, in consideration of being paid a total loss of the freight, to assign over to them, 'all their right and title to all future benefit that might occur thereafter, except as insurers therein.' The ship having arrived and earned freight, the defendants, who are the assured, received the whole, as if they had never abandoned: and the question now is, whether, in an action for money had and received to their use, the underwriters or freighters are not entitled to demand what the assured have received? The Court of King's Bench, in deciding the case before them, were of opinion, that the assured had bound themselves to account to the underwriters on freight for all the freight they might receive; but in giving judgment they expressly declared, that they did not intend to decide the question between the underwriters on the ship, and the underwriters on the freight. We shall take the same course; and though the case has been argued as if it were a question between the two sets of underwriters, we desire not to be understood as giving an opinion upon such a case. We only determine that the defendants have made themselves responsible to the plaintiffs, in this form of action, for the freight which they have received." Judgment for the plaintiffs.

In the next case which came before the Court, the general question could hardly fail to be discussed, especially as the Court itself, at the close of the first argument, desired that the second might be confined to the consideration of the effect of an abandonment of a ship upon the right to the accruing freight. It was the case of *M'Carthy and others* v. *Abel.* (*a*)

It was an action brought on a policy of insurance on freight of the ship *Thomas*, upon a voyage at and from *Riga* to *Chatham*, &c. At the trial before Lord *Ellenborough*, a verdict was found for the plaintiffs for 200*l.* subject to the opinion of the Court on the following case. That the plaintiffs,
[*425] being owners of the ship, chartered her to *Thorntons* *and *Smalley*, for the voyage insured, for which freight was to be paid in certain proportions (restraints of princes and rulers during the voyage excepted.) On the ship's arrival at *Riga*, she was supplied with a cargo, and nearly the whole thereof had been taken on board, when an embargo (*November*, 1800) was laid on all the *British* shipping in the port of *Riga*. The case then states the relanding of the cargo, the abandonment to the underwriters on freight on the 11th *January*, 1801, of their interest in the freight, and demanded a total loss. And on the same day they abandoned the ship to the underwriters on ship. The case further states the restoration of the ship by *Russia*, the reloading of the ship, and the earning of the freight, which was paid by the freighters to the agent for the underwriters on ship, under an indemnity from them against any claims which might be made thereto, either by the plaintiffs or by the underwriters on freight. The plaintiffs had duly assigned over by indenture, in *February*, 1801, the ship *Thomas*, and all the interest, property, claim, or demand of the plaintiffs, in, to, or out of the said ship and her appurtenances to two persons, in trust for all the underwriters on the ship.

After two arguments, and time taken to deliberate, Lord *Ellenborough*, Chief Justice, delivered the judgment of the Court.—"The novelty of the question in this case, the value of the property, and the extent to which some of the principles laid down in the argument seemed to lead, made us desirous of every information on the different points which might arise between the several parties interested, before we came to our decision; and, therefore, we wished for a second argument on the effect of an abandonment of the ship on the accruing

(*a*) 5 East, 388.

freight. If the question which arises upon this case be stripped of extraneous circumstances, it appears to resolve itself into this single point, whether the freight have been in this case lost or not? If the fact be merely looked at, freight in the events which have happened has not been lost, but has been fully and entirely earned and received by, or on behalf of the plaintiffs, the assured; and if so, no loss can be *properly demandable from the underwriters [*426] on freight, who merely insure against the loss of that particular subject by the assured. But if it have, or can be, in any other manner or sense, lost to the owners of the ship, it has become so lost to them, not by means of the perils insured against, but by means of an abandonment of the ship, which abandonment was the act of the assured themselves, and with which, therefore, and the consequences thereof, the underwriters on freight have no concern. It appears to us, therefore, that *quâcunque viâ datâ*, that is, whether there has been no loss at all on freight, or being such, it has been a loss only occasioned by the act of the assured themselves, that they are not entitled to recover. There must, therefore, be a judgment of nonsuit.

The next case was *Sharp* v. *Gladstone*, (*a*) similar in its circumstances to the preceding, and where it was held that freight received by the owner was payable to the underwriters on freight, subject to a deduction of a proportion of the charges of the voyage. Lord *Ellenborough* said, "As to the general question, whether an abandonment could be made to the underwriters on freight, after an abandonment to the underwriters on ship, I beg to be understood as giving no opinion: and with respect to that, this not being the case of a chartered but of a sinking or general ship, a distinction may arise." (*b*)

The question, however, between the two sets of underwriters came at length expressly before the Court, in the case of *Case* v. *Davidson*. (*c*) A ship was insured as a general ship on a voyage from *Rio Janeiro* to *Liverpool*, and the freight of the voyage was insured by other policies. The ship being captured, the owners abandoned to the respective underwriters. She was afterwards recaptured, arrived at **Liverpool*, and earned freight. It was [*427] agreed between the owners and the underwriters on the ship (but not by the underwriters on freight,) that the defendant should sell the ship and receive the proceeds, and also the freight of the cargo, for the benefit of those who should be legally entitled to it. The respective underwriters on ship and freight, had severally settled for a total loss, and they now severally claimed the freight which had been earned. It was contended, on the part of the underwriters on the ship that the abandonment of the ship conveyed to them the ship's future earnings; and that their title to these earnings was not affected by an abandonment to the underwriters on freight; and the cases of *Chimney* v. *Blackburne*, (*a*) *Splidt* v. *Bowles*, (*b*) and *Morrison* v. *Parsons*, (*c*) were referred to as authorities, to show that, by an assignment of the ship, the freight passes to the assignee, and payment to him will be good. It was argued on behalf of the underwriters on freight, that as the freight was a distinct subject of insurance, the law would mould these contracts when they occurred so as to keep the rights of the respective parties distinct, whereas if the underwriters on the ship were to be entitled to her earnings it would be to confound the two species of abandonment, and make the insurance on freight of no avail. The

---

(*a*) 7 East, 24.

(*b*) See Barclay v. Stirling, 5 M. & S. 6, where a ship went on shore, the insured on freight abandoned and recovered for a total loss: freight being afterwards earned, the Court held that the underwriters were entitled to it after a deduction of the expense of procuring it.

(*c*) 5 M. & S. 79.

(*b*) 10 East, 279.

(*a*) 1 H. Black. 117, in notis.

(*c*) 2 Taunt. 407.

Court, with the exception of Mr. J. *Bayley* delivered their judgment in favour of the underwriters on the ship.

Lord *Ellenborough*.—"Although this question now comes distinctly in judgment before us for the first time, yet it has, I own, been long considered, in my mind, as settled that freight follows, as an incident, the property in the ship; and therefore, as between the respective underwriters on ship and freight, an abandonment of the ship carries the freight along with it. The underwriter, indeed, does not become privy, by virtue of such abandonment, to any existing charter-party, nor perhaps to any contract of affreightment, before made with the owner; but, I think, that by the abandonment, he *acquires [*428] possession of the thing, from the use of which freight is to be earned. It is true that the ship owner may have entered into contracts for the insurance of the freight, and that by abandonment of the ship, the underwriters on freight will be deprived of some rights to which, perhaps, they would be otherwise entitled; but this will necessarily happen, if the underwriter on ship is entitled to look, without reference to the contracts of other persons, to his own contract, and to those consequences which result to him from abandonment. An abandonment to the underwriter on ship, transfers to him not merely the hull, but the use of the ship, and the advantages resulting from the completion of the voyage. The underwriter on freight will certainly by this doctrine lose the specific thing abandoned to him, except where the assured is entitled to the freight; but abandonment of the freight cannot break in upon the rights of those who are entitled to the ship. And I own it seems to me, that it cannot make a difference, whether the underwriter on ship has or has not a notice of the insurance on freight; for I rest on this simple ground, that the abandonee of the ship has all the rights of the shipowner cast upon him by operation of that emphatic word in the law-merchant, abandonment, and being so entitled, has a right, if he uses the ship for completing her voyage, to her earnings, as against all the world."

Abbott, J.—"I am of opinion that the plaintiff is entitled to recover. The question comes now for the first time to be decided, but it is not new to the Court; an opinion has been expressed upon it in several cases. Nor is it by any means a new point to the minds of professional men, who have been at all conversant with the law-merchant. Now this is a principle clearly established, that if the ship be sold, the vendee is entitled to the freight as an incident to the ship. And, on that principle, I found my judgment in this case, being of opinion that an abandonment is equivalent to a sale of the ship. It was argued by Mr. *Littledale*, that since a practice has prevailed in this country of insuring ship and freight separately, the underwriters on ship must contemplate *that inasmuch as freight may be the subject of a separate in- [*429] surance, it may also be separately abandoned. But this argument is built upon an assumption that an abandonment of freight convey to the abandonee a right to the freight, in preference to the right of the abandonee, of the ship, which is assuming the whole question. As well might it be argued that as the underwriter on freight is aware that the ship may be separately insured, he must be, therefore, taken to know that an abandonment of the ship will convey all the incidents belonging to it to the abandonee. The practice, therefore, of insuring ship and freight separately, seems to me to afford no argument whatever either way to show what the law is or ought to be. If it had been the practice that upon separate insurances, the abandonee of freight should take the freight notwithstanding an abandonment of the ship, such a practice might have afforded a construction, but we do not find that there has been any such practice."

Holroyd, J.—"It appears to me that when the shipowner abandons his ship to the underwriter, the latter stands in all respects as to future benefit in place

of the owner. It follows, as a consequence of abandoning the ship, that the owner divests himself of his right to freight, which is incident to the ship, and the same becomes vested in the abandonee, to whom it is competent to possess himself of the ship, and if she be unfreighted, to endeavour to obtain for her a freight. And if the ship be freighted, yet, as it seems to me, the underwriter is not bound to complete the voyage, because the rights of the owners of the goods laden on board, are personal, lying in contract with the shipowner and not running with the ship, and being in respect of a personal chattel, an action lies not against the underwriter, but the shipowner alone." (*a*)

In *Green* v. *The Royal Exchange Company*, (*b*) which *was an action on a policy on freight, and where the ship, after having received her cargo was, by sea-damage, so disabled as to make it impossible for her to bring it home, the question was whether an abandonment was necessary? The Court of Common Pleas held it was not, Lord Chief Justice *Gibbs* observing, "he could not understand what there was to be abandoned." (*a*) [*430]

1. In many of the maritime countries on the continent of *Europe*, the time, within which the abandonment must be made, is fixed by positive regulations. Thus in *France*, (*b*) it is ordained, that all cessions or abandonments, as well as demands in virtue of the policy, shall be made as follows:—In six weeks, for losses happening on the coasts of the country where the insurance was made; in three months, in other provinces of our kingdom; in four months, on the coast of *Holland*, *Flanders*, and *England;* in a year, *Spain*, *Italy*, *Portugal*, *Barbary*, *Muscovy*, *Norway;* and in two years, for the coast of *America*, the *Brazils*, *Guinea*, and other distant countries. When these terms are elapsed, the demands of the assured shall not afterwards be admitted. In cases of detention, the same ordinance provides, that the abandonment shall not be made before six months, if it happen in *Europe* or *Barbary*. If in a more distant country in a year; both to commence from the day of the notifying this detention to the insurers. A similar regulation to that last-mentioned is to be found in the ordinances of *Bilboa*. (*c*)

In the law of *England* till lately we had no limitation of time, with respect to abandonment. But from what has been said in the preceding part of this section, it would appear, that the insured has a right to call upon the underwriter for a total loss, and of course to abandon, as soon as he hears of such a calamity having happened, his claim to an indemnity not being at all suspended by the chance of a future recovery of part of the property lost: because, by the abandonment, *that chance devolves upon the underwriter, by which means the intention of the contracting parties is fully answered, and complete justice is done. (*a*) [*431]

'Thus in the case of *Allwood* v. *Henckell*, (*b*) an action on a policy of assurance on linen on board the *Amphitrite*, at and from *London* to *Jamaica*.

(*a*) A learned foreign writer in commenting on the 15th article, tit. Insurance, which prohibits the insurance on freight, is of opinion that freight is an incident to the ship, and must from its nature follow it. Valin, liv. 3, tit. 6.

(*b*) 6 Taunt. 68.

(*a*) See also Idle v. Royal Exch. Comp. 8 Taunt. 755. Mount v. Harrison, 4 Bing. 388.

(*b*) Ord. of Lou. XIV., tit. Insurance, art. 48.

(*c*) Art. 49; 2 Mag. 416.

(*a*) See *ante*, p. 371; and see *ante*, p. 364, where Lord Abinger, in Roux v. Salvador, says, "But if he elects to do so, as the insured, or a portion of it still exists, and is vested in him, the very principle of the indemnity requires that he should make a cession of all his right to the recovery of it, and that too within a reasonable time after he receives intelligence of the accident.

(*b*) Guild. sit. in B. R. after Mich. 1795. Park Ins. 399.

The *Amphitrite* was taken by a *French* privateer within a few leagues of *Jamaica*. Part of the property insured was plundered and taken out of the ship. The captain, boatswain, and all but seven men, were taken out of her; a fortnight after she was captured, as the captors were making their way to *America*, the ship, with the remainder of her cargo, was retaken by an *English* frigate, and taken under a prize-master to *Antigua*. The ship and cargo were both sold under a decree of the Vice Admiralty Court of *Antigua*, by a prize-agent, who received the proceeds, and was to pay them over to the concerned, upon payment of one-eighth salvage pursuant to the last Prize Act.

The capture and recapture were entered at *Lloyd's* on the 15th of *February*, 1795; but it was not known where the ship was carried till the 30th of *March*, when a letter was received at *Lloyd's* addressed to the owners and freighters and underwriters on ship *Amphitrite* and cargo, from the Judge of the Vice Admiralty Court of *Antigua*, informing them of the arrival and sale of the ship and cargo, under a decree of the Court, and desiring to have some agent appointed to remit the proceeds to *England*. Powers of attorney were sent out in *April* by the assured for this purpose; and the proceeds were desired to be remitted to the banking-house of *Smith*, *Payne* & *Smith*, one of which gentlemen was agent to the assured. The defendant was acquainted in *April* of the loss but no abandonment was proved to have been made till *August*, near four months after Mr. *Payne*, who was the plaintiff's agent, had sent out the power of attorney. On the part of the plaintiff, it was contended that, admitting there was no abandonment, in this case the property having been absolutely sold and converted into money, before the parties knew where the ship was taken to, the loss was absolutely total in its nature; and, therefore, there was no occasion for an abandonment.

[*432]

Lord *Kenyon*, though he did not give any decided opinion upon this point, inclined to think, "that an abandonment was necessary, and that the case was the same as if the property had remained in *specie* at *Antigua*, and had not been sold. That the assured is not bound to abandon in any case; and might, in case the sales had been very advantageous, have taken the benefit of them in the same manner as they might have retained this property, if it had remained in specie. But the assured must make his election speedily, whether he will abandon or not, and put the underwriter into a situation to do all that is necessary for the preservation of property, whether sold or unsold. He cannot lie by and treat the loss as an average loss, and take measures for the recovery of it without communicating that fact to the underwriters, and letting them know that the property is abandoned to them." (*a*)

Verdict for plaintiff, subject to an account as for average loss.

The making the election to abandon speedily, or in the first instance, means the earliest opportunity after they have examined into the state of the cargo; but they are not to lie by in order to govern their determination by the rise or fall of the market. (*b*) Nor can the assured, when they have not abandoned in the first instance, afterwards do so, when they find in the result that the salvage and expenses exceed the value of the ship. (*c*)

[*433]

But if the insured, hearing that his ship is much disabled and has put into port to repair, express his desire to the underwriters to abandon, and be dis-

(*a*) See also Anderson v. The Royal Exchange Assur. Comp. 7 East, 38, and Barker v. Blakes, 9 East, 283. See also Parmeter v. Todhunter, 1 Camp. 591. In the case of Hodgson and another v. Blackiston, sitt. after Hil. Term, 38 Geo. 3, in the King's Bench, it was held, that a notice of abandonment was necessary, though the ship and cargo had been sold and converted into money when the notice of the loss was received.

(*b*) Gernon v. The Royal Exch. Assur. 2 Marsh. 88.

(*c*) Martin v. Crokat, 14 East, 465.

suaded from it by them, and they order the repairs to be made, they are liable to the owner for all the subsequent damage occasioned by that refusal, though it should amount to the whole sum insured. Because the reason why notice of abandonment is deemed necessary, is to prevent surprise or fraud upon the underwriter; but in the case put, they have, by their own act, superseded the necessity of notice. (*c*)

And where the assured were guilty of a *laches* of five days in offering to abandon after the time, when by the usual course of the post they must have received intelligence of the loss, the notice was held to be too late. (*d*)

And so an underwriter is bound to say within a reasonable time after notice of abandonment, whether he will accept it or not. (*e*)

An abandonment may be by parol, but it should be certain; and therefore a statement of the facts, a request to settle for a total loss, and to direct the disposal of the ship, have been held insufficient. The word "abandon" ought to be made use of. (*f*) And where a letter, addressed to the assured, stating that the ship had been forced on shore and a quantity of sugars damaged, was shewn by the broker to the underwriters, and they in answer directed that "the assured would *do the best they could with the injured property," this letter was held not to amount to a notice of abandonment, but merely to impart a wish that the assured would make the average loss as light as possible. (*g*) [*434]

OF AVERAGE LOSSES.

We come now to the second division, which we mentioned at the commencement of this section, of "losses and misfortunes," which are the words expressed in the policy, and have been taken, with the concluding sentence, for the subject of the present section. We have already seen that in many instances the law, as well as the terms of the policy, (which it in fact only interprets) justifies and enjoins the assured to act, in the case of an accident, in the best manner that they are able, in regard to the thing insured, for the benefit of all concerned. And we have, in many of the preceding cases on the subject of total losses and abandonment, seen in the cases either where, as has been laid down, an abandonment is necessary to render a constructive loss a total one, by which the assured can recover from the underwriters the whole sum insured, and in the other cases where, as we have also seen, that the adventure and thing insured is so absolutely destroyed in whole or in part, so as to render the loss total, without any need of notice of abandonment, it is in both of these cases proper for the assured, or his agents, to save as much of the thing insured as they are able; and in the case of a sale either of a ship which is not considered worth repairing, or in the case of goods which are, although perhaps in existence in specie reduced to a certain degree, yet would be most clearly and entirely annihilated and good for nothing, if attempted to be sent by another ship to the end of their original destination: it is, I say, the duty of the assured to take care of the money proceeding from such sale while *invested in him, for the benefit of all concerned in the adventure. As Lord *Abinger*, in the judgment of *Roux* v. *Salvador*, (*h*) observes that, in all these cases, "not only the thing assured, or part of it, is supposed to exist in specie, [*435]

(*c*) Da Costa v. Newnham, 2 T. R. 407.

(*d*) Hunt. v. Royal Exch. Comp. 5 M. & S. 47. See also Read v. Bonham, 3 B. & B. 147. Alridge v. Bell, 1 Stark. 498. Kelly v. Walton, 2 Camp. 155. Abel v. Potts, 3 Esp. 242.

(*e*) Hudson v. Harrison, 3 B. &. B. 97.

(*f*) Per Lord Ellenborough, 1 Camp. 541. Parmeter v. Todhunter.

(*g*) Thelluson v. Fletcher, 1 Esp. 73. (*h*) 4 Scott, 33.

but there is a possibility, however remote, of its arriving at its destination, or at least of its value being in some way affected by the means which may be adopted for the recovery or preservation of it. If the assured prefers the chance of any advantage that may result to him beyond the value insured, he is at liberty to do so; but then he must also abide the risk of the arrival of the thing insured in such a state as to entitle him to no more than an average loss. If in the event the loss should become absolute, the underwriter is not the less liable upon his contract, because the assured has used his own exertions to preserve the thing insured, or has postponed his claim till that the event of a total loss has become certain which was before uncertain." This principle must equally apply to all cases, whether they turn out total losses or merely average ones. I must, however, observe, before we enter on the consideration of average losses in particular, that there is in the after part of the policy a clause, called the "memorandum," by which the underwriters protect themselves from the payment of average losses on the insurance of some particular goods, unless general, or the ship be stranded. Of this more hereafter, when we come to the memorandum itself.

In the case I have just mentioned, where one point of the case was, whether the loss was an average or total loss, Lord *Abinger* observes, "that upon the first point it had been contended that even if these goods (hides) had not been excepted from average loss by the memorandum, (unless upon condition of the stranding of the ship) there would not in that case be a total loss, and that, *a fortiori*, being goods so expressly excepted from average loss by the policy, they could not become totally lost so long as any part of them remained in
[*436] specie at the termination of the risk; that the *risk terminated when the goods were taken out at *Rio de Janeiro*, when they were so far from being destroyed by the perils of the sea, that they were actually sold as hides, and were capable of being tanned. It seems to us that there is no ground whatever for this assumed distinction between goods that are subject to an average loss unconditionally, and goods excepted by the memorandum from such a loss. The interest which the assured may have in certain cases to convert a loss into a total one, may be a fair argument to a jury upon a doubtful question of fact as to the nature of the loss, or the motive of abandonment. But there is neither authority nor principle for the distinction in point of law; whether a loss be total or average in its nature must depend upon general principles. The memorandum does not vary the rules upon which a loss shall be average or total: it does no more than preclude the indemnity for an ascertained average loss, except on certain conditions.

There is a fallacy in applying the words "termination of the risk," to the determination of the adventure before that period by peril of the sea. The object of the policy is to obtain indemnity for any loss that the assured may sustain, by the goods being prevented, by the perils of the sea, from arriving in safety at the port of their destination. If by reason of the perils insured against, the goods do not so arrive, the risk may in one sense be said to have terminated at the moment the goods are finally separated from the vessel. Whether, upon such an event, the loss is total or average, no doubt, depends upon circumstances. But the existence of the goods, or any part of them in specie, is neither a conclusive, nor in many cases, a material circumstance to that question. If the goods are of an imperishable nature, if the assured become possessed of or can have the control over them, if they still have an opportunity of sending them to their destination, the mere retardation of their arrival at their original port, may be of no prejudice to them beyond the expense of reshipment into another vessel. In such a case, the loss can be but an average
[*437] loss, and must be so deemed, *even though the assured should for some real or supposed advantage to themselves, elect to sell the

goods where they have been landed, instead of taking measures to transmit them to their original destination. Accordingly, in the case of *Hunt* v. *Royal Exchange Company*, (*a*) the judgment of Lord *Ellenborough* contains a very important passage, which distinguishes it from the present case. He says, "if, indeed, the cargo has been of a perishable nature, this would not have been a case of retardation only, but of the destruction of the thing insured;" and further, he says, "I cannot necessarily infer that the flour would be changed in quality and condition by the delay from *November* to *April*, so as to incur any material damage operating a destruction of the thing insured." And in the case of *Anderson* v. *Wallace*, (*b*) the goods consisted of copper which was wholly uninjured, and of iron which was partially damaged; the assured by their own agent had possession of them, the ship was capable of repair, and might have prosecuted the voyage, and did, in four weeks after the accident, sail upon another voyage; upon which ground, combined with other circumstances, the Court held the loss *not* to be total. But it is clear, from the judgment of the Court, that if by reason of the perils of the sea, the goods could never be sent to their destination, the loss would have been held to be total. In like manner, it will be found in other cases cited, that there has always existed one or more circumstances in combination with that of the goods existing in specie, to induce the judgment that the loss was not total: as in *Glennie* v. *The Royal Exchange Company*, (*c*) the rice had arrived at its port of destination, and though damaged, was delivered to the consignees, and in a saleable state as rice. In *Thompson* v. *The Royal Exchange Company*, (*d*) the tobacco and sugar, though damaged by the perils of the sea, were in the hands of the owner at *Heligoland;* and as stated by Lord *Ellenborough*, *(in his judgment,) might for any reason that appeared, have been forwarded to the port of their destination. In *Anderson* v. *The* [*438] *Royal Exchange Company*, (*a*) the wheat was partly saved, was in the hands of the shipper at *Waterford*, was kiln-dried, and might have been forwarded, as the rest of the cargo was, after the same operation to its port of destination; but the owner, after dealing with it as his own, abandoned it too late, even if he had a right to abandon it at all. In the case before us, the jury have found that the hides were so far damaged by a peril of the sea, that they never could have arrived in the form of hides; by the process of fermentation and putrefaction which had commenced, a total destruction of them before their arrival at their port of destination, was as inevitable as if they had been cast into the sea, or consumed by fire. Their destruction not being consummated at the time they were taken out of the vessel, they became in that state a salvage for the benefit of the party who was to sustain the loss, and were accordingly sold; and the facts of the loss and the sale were made known at the same time to the assured. Neither he nor the underwriters could at that time exercise any control over them, or by any interference alter the consequences. It appears to us, therefore, that this was not the case of what has been called a constructive loss, but of an absolute total loss of the goods: they could never arrive; and at the same moment when the intelligence of the loss arrived, all speculation was at an end."

We see from this part of the judgment in *Roux* v. *Salvador*, in what consists the essential difference between a total and an average loss in the case of goods.

It is the same with respect to the difference between the average or total loss of the ship. The case of *Cambridge* v. *Anderton* (*b*) is, as Lord *Abinger*

(*a*) 5 M. & S. 47.
(*b*) 2 M. & S. 240.
(*c*) 2 M. & S. 371.
(*d*) 16 East, 214.
(*a*) 7 East, 38.
(*b*) 2 B. & C. 697.

says in the same judgment, similar in all points to the case of *Roux* v. *Salvador*, the one relating to the goods, the other to the ship: and that [*439] case is *an express decision, that where the subject-matter insured has by a peril of the sea lost its form and species—where a ship, for example, has become a wreck or a mere congeries of planks, and has been *bonâ fide* sold in that state for a sum of money, the assured may recover a total loss without any abandonment. So Chief Justice *Tindal*, in the recent case of *Benson* v. *Chapman*, (*a*) (which was referred to in a former part of this section) says—"It is unnecessary to cite authorities, to prove that where damage to the ship is so great, from the perils insured against, as that the owner cannot put her in a state of repair necessary for the pursuing the voyage insured, except at an expense greater than the value of the ship, he is not bound to incur that expense, but is at liberty to abandon and treat the loss as a total loss." But in the case of *Doyle* v. *Dallas*, tried before Lord *Tenterden* at *Guildhall*, on a policy of insurance on the ship *Triton*, averring a total loss by perils of the sea. The ship had been wrecked, and was sold by the owner, and soon afterwards got off by the purchaser, though at a great expense; Lord *Tenterden*, in summing up to the jury, said, "The only question is, whether this amounts to a total loss? The ship is not bodily and specifically lost; but circumstances may have occurred, which, according to the law established in cases of marine insurance, are equivalent to a total loss. I think the circumstances in this case will have that effect, if, at the time of the sale, that measure, on the sound exercise of the best judgment appeared most beneficial to all parties. It is not enough that the owner acted honestly in the sale, and intended to do for the best, the underwriters are not liable unless he formed a correct judgment, that is to say, the best and soundest judgment which could be formed under the circumstances which then existed. Nothing less than this will make a total loss, while the ship continues in existence. If the ship could have come to *England* even in ballast, (certainly with any cargo) so that on her [*440] arrival *she would have been worth the money expended on her, she ought to have been repaired for the purpose. The loss of the voyage will not, in my opinion, make a constructive total loss of the ship. Some cases have been so decided; but as the thing remained in specie, I do not think that it amounted to a total loss. The best thing for the underwriters must be done not merely for the owner, and as they indemnify only against the loss of the ship, the loss of the voyage would not injure them. Taking all the circumstances into your consideration, if you are of opinion that the plaintiff, acting as he did, exercised a sound judgment as well for the benefit of the underwriters as for his own interest as owner, did, what at the time was best for all parties—your verdict will pass for the plaintiff—if otherwise, for the defendant." Verdict for the defendant. A motion was afterwards made for a new trial which was refused.

After these observations with regard to average losses, and with the reference which I have made to a few of the leading cases which draw the line of distinction between them and total losses, either constructive requiring abandonment to the underwriters, or absolute total losses, when the thing insured has actually lost its form and species which require no abandonment; we will now confine our attention to the subject of average losses in particular, and, as the principles of law on this head are, as upon most other heads of marine insurance law, to be gathered from the words of that great Judge, Lord *Mansfield*, I shall at once refer the reader to the very important case of *Lewis and another* v. *Rucker*, (*b*) fully treated of in a former part of this Treatise. (*c*)

(*a*) 7 Scott's N. R. p. 641, and *ante*, p. 394.
(*b*) 2 Burr. 1167.
(*c*) *Ante*, p. 263.

In a subsequent case of *Le Cras* v. *Hughes*, (*c*) Lord *Mansfield* said, that the case of *Lewis* v. *Rucker* should be the rule in all similar cases, viz: wherever there was a specific description of casks or goods: but in *Le Cras* v. *Hughes*, the property which consisted in various goods taken *from an enemy, was valued at the sum insured, and part was lost by the [*441] perils of the sea; consequently the same rule could not be adopted, on account of the nature of the thing insured. The only mode was to go into an account of the whole value and take a proportion of that sum, as the amount of the goods lost.

In the case of *Dick and another* v. *Allen*, (*a*) which was an action before Mr. J. *Buller*, upon a policy of insurance to recover an average loss upon goods, the learned Judge observed, that in such cases, whether the goods arrived at a good or bad market, was immaterial, for the true way of estimating the loss, was to take them at the fair invoice price.

And in *Thelluson* v. *Bewick*, (*b*) it was held by Lord *Kenyon*, that in a policy of insurance the underwriter does not insure against any loss that may arise from the difference of the exchange.

In *Amery* v. *Rodgers*, (*c*) which was an insurance on the ship *Dart* from *St. Kitts* to *London*, on which the defendant had underwritten 200*l.*, the plaintiff had written to his agent in *London* to effect a policy on ship and cargo, calculating the ship at 1,500*l.* of that sum. No goods were ever loaden on board. Lord *Kenyon*, though he first doubted, afterwards adopted the rule which the special jury assured him was established at *Lloyd's Coffee-house* for settling losses of this kind, namely, that as the policy never attached, the assured was entitled to recover such a proportion of the sum which the defendant had underwritten, as the property on which the policy attached bore to the whole.

Mr. Justice *Park* observes, (*d*) "that as clearness and precision are necessary upon all subjects, and more especially upon this, that it is to be borne in mind, that when we speak of the underwriter being liable to pay, whether for total or average losses, they are liable only in proportion to the sums *which they have underwritten. Thus if a man underwrite [*442] 100*l.* upon property valued at 500*l.*, and a total loss happen, he shall pay 100*l.*, that being the amount of his subscription: and if only an average loss amounting to 60*l.* or 70*l.* per cent., then he shall pay only 60*l.* or 70*l.*, being his proportion of the loss.

The learned Judge has left this passage without the qualification which more recent experience should have suggested; he was aware of the case of *Le Cheminant* v. *Pearson*, (*a*) for it appears in the last edition by him in a note at page 49, but it ought to have been referred to at the part of his Treatise from which I have copied his general observations of the payments to which the underwriter's liabilities are limited. However, dismissing this remark, I must refer to the subject, to shew that those observations of the learned author must be taken *now* with several grains of allowance. The liability of the underwriter is not restricted to the single amount of his subscription, but he may be subject either to several average losses, or to an average and total loss, or to money expended (in the words of the policy which form part of the head of this section) "in and about the defence, safeguard, and recovery of the ship," to a much greater amount than his subscription. (*b*) I shall first refer to the case I have just mentioned, and afterwards to some other authorities.

(*c*) B. R. East, 22 Geo. 3. Park Ins. p. 233.
(*a*) At Guild. after Mich. Term, 1785. Park Ins. 226.
(*b*) Sit. after Mich. 34 Geo. 3, 1 Esp. 77. (*c*) 1 Esp. 207.
(*d*) Park Ins. p. 221. (*a*) 4 Taunt. 367.
(*b*) See also per Lord Abinger, in Brooks v. M'Donnell, 1 Y. & C. 515.

In that case, which was on a policy of insurance on a ship, "at and from *Jersey* to a port or ports in *Norway*," the first count of the declaration averred that during the voyage the ship, by force of the winds and the waves, and by the perils of the sea, was damaged to the amount of 373*l.* 13*s.* 10*d.*, and that thereupon the assured, their factors, servants, and assigns, did sue, labour, and travel for, in and about the defence, safeguard, and recovery of the ship, and thereby incurred charges and expenses, to wit, to the amount of 373*l.* 13*s.* 10*d.*; and averred that the proportion contributable by the defendant, according [*443] to the rate and amount of *his subscription, amounted to 12*l.* 9*s.*; and that afterwards the vessel sailed from *Jersey*, on the voyage insured, and during the voyage was captured and wholly lost, by reason whereof the defendant became liable to pay the plaintiff 212*l.* 9*s.*, according to the effect of his policy. The second count proceeded on the total loss only; and there were also the common money counts. The fact was, that the vessel had been injured by a gale of wind while lying in the port of *Jersey*, previous to her voyage, and had sustained the average loss, which was admitted and was repaired by the plaintiff; afterwards the vessel was captured. The question upon this part of the case was, whether there was any legal objection to the plaintiff's recovering an average loss arising in the former part of the voyage, and for a total loss afterwards. Upon this point C. J. *Mansfield* said, "a policy of insurance is a very strange instrument, as we all know and feel; in practice, I know of cases in the Court of King's Bench where such expenses have been recovered as an average loss, without making any distinction, whether it was recoverable as an average loss from damage repaired, or within the words of the permission to "sue, labour, travel," &c., and as no such distinction has been made, we find it safer to adhere to the common practice, which has obtained, and to call it all average damage." The plaintiff, therefore, recovered both sums.

But as we must never lose sight of the main principle of law, that the assured upon a contract of indemnity is not to recover for what he has not in fact been actually damnified, a most important distinction is, in this place, to be drawn between a case of the above description, and one in which, by the intervention of subsequent circumstances, the previous deterioration of the subject-matter is ultimately a matter of perfect indifference to the assured's interests. And this is the great principle contained in the case of *Livie* v. *Janson*, which was referred to in a former section, for the position "*causa proxima* [*444] *non remota spectatur.*" (*a*) In that case the *ship, which was "warranted free from *American* condemnation," was driven on shore in the night, where she received a partial damage, but was seized the next day, and condemned by the *American* government; and the Court of King's Bench held, that as there was a total loss excepted out of the policy, the assured could not recover for the previous average loss, which in the event became wholly immaterial to the assured. Lord *Ellenborough*, C. J., said, "considering the deterioration of the ship and cargo as to the extent of what is referable to the head of sea-damage, we think we may lay it down as a rule, that where the property deteriorated is afterwards totally lost to the assured, and the previous deterioration becomes ultimately a matter of perfect indifference to his interests, he cannot make it the ground of a claim upon the underwriters. The object of a policy is indemnity to the assured; and he can have no claim to indemnity where there is ultimately no damage to him from any peril insured against. If the property, whether damaged or undamaged, would have been equally taken away from him, and the whole loss would have fallen upon him had the property been ever so entire, how can he be said to have been injured by its having been antecedently damaged?"

(*a*) 12 East, 648. *Ante*, p. 271.

In this case we must observe, that the accident which occasioned the average loss, and the cause of the total loss, formed parts of one continued transaction, and that there was no endeavour made by the assured, or expense incurred by them in repairing it, between the interval of the average and total loss. His Lordship goes on to say, "There may be cases in which, though a prior damage be followed by a total loss, the assured may, nevertheless, have rights or claims in respect of that prior loss, which may not be extinguished by the subsequent total loss. Actual disbursements for repairs in fact made, in consequence of injuries by perils of the seas prior to the happening of the total loss, are of this description; indeed, they are more properly to be considered as covered by that authority, with which the assured is generally invested by the policy of 'suing, labouring, and travailing,' &c., *in which case the amount of such disbursements might more properly be [*445] recovered as money paid for the underwriter, under the direction and allowance of this provision in the policy, than to a substantive average loss to be added cumulatively to the total loss which is afterwards incurred in consequence of sea risks."

This subject was mentioned, and the cases, (which I have just considered) referred to, in a very important and recent case of *Stewart* v. *Steele*. (*a*) I shall state the case the more fully on account of its general applicability to the subject of this section.

This was an action on a policy of insurance "for twelve calendar months, commencing the 1st *May*, 1835, and ending 30th *April*, 1836, both days inclusive, in port or at sea, in all places, at all times, and on all services, upon any kind of goods and merchandises, and also upon the body, tackle, apparel, ordnance, munition, artillery, boat, and other furniture of and in the good ship or vessel called the *Sherburne*, valued at 8,000*l*." The declaration, after setting out the policy and averring the plaintiff's interest in the ship, stated that on the 1st of *May*, 1835, the said ship was in safety in harbour at *Bombay*, in the *East Indies*; that afterwards, and before the 30th *April*, 1836, to wit, on the 20th *August*, 1835, whilst the said ship was protected by the said policy, the said ship was, by the perils of the sea and by stormy and tempestuous weather, and by the violence of the winds and waves, greatly strained, bulged, broken, and otherwise damaged in her body, rudder, bowsprit, irons, and other parts, whereby it became necessary to repair the damage done to the said ship as aforesaid; that after such damage had arisen as aforesaid, and in consequence thereof, the plaintiff, by himself and servants and agents, to wit, on the day and year last aforesaid, did labour for, in, and about the safeguard, safety, and preservation of the said ship or vessel, and in so doing, and in and about the necessary repair of the said ship, by *reason of the damages so by [*446] him sustained as aforesaid, did necessarily lay out and expend a large sum of money, to wit, the sum of 1,000*l*., whereby the defendant, according to the terms of the said policy, and of his said promise and undertaking, then became liable to pay, and ought to have paid the plaintiff 150*l*., being the rateable proportion of the expense aforesaid, which the defendant ought to have paid and contributed in respect of the insurance aforesaid, whereof the defendant then had notice; and that afterwards, and during the continuance of the risk, and whilst the said ship in the said policy of insurance mentioned was protected by the said policy, to wit, on the 10th of *October*, 1835, the ship in the said policy mentioned, by stormy weather, &c., became and was wholly lost to the plaintiff, of which premises he, the defendant had notice.

There was also a count for money had and received, and a count upon an account stated.

(*a*) 5 Scott's N. R. 927.

The defendant first as to so much of the first count as stated, &c. (following the allegation of the count) the defendant saith the plaintiff ought not further to maintain his action, because the defendant brings into Court the sum of 18*l.* 18*s.* ready to be paid to the plaintiff, and the defendant saith the plaintiff hath not sustained damages to a greater amount than the said sum of 18*l.* 18*s.*, in respect of the said causes of action in the introductory part of that plea mentioned, &c.

Secondly, he pleaded to so much of the first count as stated, that the said ship was lost by storms, &c., that the said ship was not lost by storms, winds, &c., concluding to the country. Thirdly, to the two last counts non assumpsit.

The cause was tried before *Tindal*, C. J., at the Sittings at *Guildhall*, after Hil. Term, 1841. The *Sherburne* left *Calcutta* on the 11th *July*, 1835, with goods and passengers for *England*. In going down the river *Hooghley*, the steamer which was towing her, came athwart her hawse, striking her, according to the plaintiff's witnesses, with considerable violence on the larboard bow. The *Sherburne* proceeded on her voyage, but was found so leaky as to be

[*447] *obliged to return to *Calcutta*, which she did on 23rd *July*. On her return there she was put into dock, and surveyed by a ship-builder and by a surveyor to the *Calcutta Insurance Office*, and also by the surveyor to the agents to *Lloyd's*. She underwent some repair and recoppered: and set sail for *England*, but she was again compelled to return, was put into a dock, her wales, &c., removed for the purpose of examining the condition of her timbers, and was ultimately found so defective, as to render it inexpedient to repair her; and consequently she was sold as she lay, for the purpose of being broken up. Notice of abandonment was given on the 9th *October*, 1835, before the sale. On the part of the plaintiff, it was insisted that the underwriters were liable for all the expenses incurred on both occasions of the vessel's return to *Calcutta*, including the recoppering and the replacing the wales. For the defendant, it was submitted that the underwriters were only liable for that which was the immediate and necessary result of a peril insured against, and they were not liable for the expense of recoppering, nor the expense which would have been incurred had the wales been replaced; nor, indeed, for any of the expenses incurred on the second return of the vessel. The money paid into Court, (six guineas per cent.) was sufficient to cover the expenses incurred upon the first occasion, excluding the new coppering. And it was agreed that in the event of the jury finding for the plaintiff on the first issue only, the damages should be referred. The Lord Chief Justice in his summing up, told the jury that they were to say with a reference to the first issue, whether or not enough had been paid into Court to cover the average loss: that the underwriters were liable for all the consequences that naturally and necessarily flowed from the injury sustained by the *Sherburne*, from the collision with the steamer on the 11th of *July:* that beyond this there were two points for their consideration,—first, whether the underwriters were not also liable for the expense of recoppering the vessel on her first return to *Calcutta*,—secondly, whether

[*448] the repairs not having *been completely and effectually done upon the first occasion, they were not also liable for the expenses incurred on the second? that if the new coppering was rendered necessary by the natural decay and wear of the old copper, or in consequence of the collision: that if the stripping off the copper were rendered necessary by the collision, the expense of replacing it and restoring the ship to a navigable state, must fall on the underwriters; otherwise not. As to the second issue, his Lordship left it to the jury to say, whether or not the total destruction and loss of the ship was the result of the collision.

The jury having retired for a considerable time, returned into Court with the following verdict:—

Verdict for the plaintiff on the first issue, sufficient not having been paid into Court to cover the expense of stripping off and replacing the copper, for all the repairs and charges on both occasions of the return of the vessel actually incurred, and also what would have been necessary for replacing the wales, which we consider was the consequence of the collision. A rule *nisi* for a new trial, on the ground that the verdict was against evidence, was obtained on the part of the defendant.

On the argument on showing cause, it was argued for the plaintiff, that he was entitled to recover the expense actually incurred in removing them, and also that which would have been incurred had they been replaced.

Maule, J.—Do you contend that if the ship sustains an average loss in the course of a voyage, and she is afterwards totally lost, the average damage never having been repaired, the assured could recover in respect of the average loss?

Tindal, C. J.—Here the expense was never incurred, how then can the underwriters be charged with it?

Maule, J.—Suppose a vessel loses a mast by a peril insured against; if the mast be replaced, no doubt the underwriters are liable: but suppose, after the loss of the mast and before the vessel is refitted, she is totally lost, whether by a peril insured against, or in consequence of some wrongful act *for which the underwriters are not liable—could the assured recover in respect of the average loss? Clearly he could. [*449]

Maule, J.—"It has repeatedly and consistently with good sense been decided that he cannot. There was a case of *Livie* v. *Janson*, (*a*) where an *American* vessel was insured, 'warranted free from *American* condemnation:' after she had sailed on her voyage she sustained damage, which had it been repaired, would undoubtedly have fallen on the underwriters: she was however not repaired; and she afterwards, being ashore in the *St. Lawrence*, was captured by the *American* government, and the underwriters were held not responsible for the average loss. The same principle was acted upon in the case of *Blackett* v. *The Royal Exchange Company*, (*b*) where it was held, that on a memorandum 'free from average under three per cent.,' the underwriter was liable for the amount of the aggregate of several average losses, each less than three per cent., though amounting together to more."

After the argument:

Tindal, C. J.—"It seems to me that the jury were clearly wrong in treating the cost of replacing the wales as an expense falling within the description of an average loss, when that expense has not been incurred at all, in consequence of the act of the assured himself. The jury say, they find for 'the plaintiff on the first issue, sufficient not having been paid into Court to cover the expenses of stripping off and replacing the copper, and for all the repairs and charges on both occasions on the return of the vessel to *Calcutta* actually incurred.' If they had stopped, I should have been satisfied with the verdict, but they add, 'and also that which would have been necessary for replacing the wales:' the whole of which they considered were the consequences of the collision. Now the ship was dismantled and the wales removed, for the purpose of ascertaining the real state of her timbers. All that was perfectly correct, and the expenses they incurred were an *immediate consequence of the average loss which had been sustained, and the expenses in respect to which the assured is entitled to be indemnified. The jury have done wrong in allowing for the possible expense which the plaintiff might have incurred in replacing the wales, but which he refused to incur, and did not, in fact, [*450]

(*a*) 12 East, 648; *ante*, pp. 271, 443. (*b*) 2 Cr. & J. 244.

incur, treating the ship in a totally different view. The proper measure of damages, in my opinion, is the average loss that was the immediate and necessary consequence of the collision, together with such charges and expenses as may be said to be incident thereto; and that does not embrace the expenses for the wales. If, therefore, the case does not go down again, the verdict should be amended by striking out so much as relates to the wales."

Maule, J., concurred respecting the wales. He then said,—"It has been suggested that the measure of the damages being matter for discretion for the jury, the Court cannot interfere when they have adopted an erroneous measure, but only when they have not acted *bonâ fide*. It is, however, the constant practice of the Court to grant new trials where the damages have been assessed on an erroneous principle; and it has never been doubted but that it is perfectly competent for the Court to do so.

"I apprehend that the expenses incurred by the owner for repairing a ship can be recovered from the underwriters only by one of two ways. One is, where they are for repairs actually done, and prudently and properly done; then they are a fit measure of the loss which the assured has sustained; he is so much the worse for a peril within the policy. It is not sufficient, however, that the expenses should have been actually incurred, in order to entitle the assured to recover them: it is also necessary that they should have been properly and prudently incurred, to make them a fit measure of the assured's loss. Suppose they are actually incurred, but under circumstances in which no prudent man would attempt to repair the damage, but would submit to it, and treat [*451] his ship as so much the worse; or suppose an anchor dropped *from the ship and lost, being a peril within the terms of the policy, possibly the anchor may be recovered at an expense far exceeding its intrinsic value; would the expense actually incurred in either case be the proper measure of damages? Clearly not. The assured, therefore, must recover the expenses, not *eo nomine* as expenses, but as the measure of the loss, where they are *bonâ fide* and prudently incurred; and in such cases the jury would deal liberally towards the assured. Expenses of this sort fall within that clause of the policy which enables the assured to lay out money for the benefit of all concerned. Money so laid out, and prudently laid out, may be recovered from the underwriters. In the present case, the jury have, by that part of the verdict which is not now complained of, found that the underwriters are liable for the whole amount of the expenses actually and *bonâ fide* incurred. That puts out of the question any claim to recover in respect of money laid out under the clause as to suing, labouring, travailing, &c., and reduces it to the question, whether the plaintiff is entitled to recover, in respect of the ship being so much the worse? It is said that the plaintiff had a vested right of action at the moment of the happening of the loss, which nothing could afterwards divest. That, I apprehend, is quite contrary to the doctrine laid down by Lord *Ellenborough*, in *Livie* v. *Janson*, (*a*) and contrary to the principle acted upon in *Blackett* v. *The Royal Exchange Assurance Company*, (*b*) and also contrary to that of the case there cited of *Cheminant* v. *Pearson*. (*c*) In *Blackett* v. *The Royal Exchange Assurance Company*, the assured having incurred expense to a considerable amount during the voyage, and there being afterwards a total loss, recovered 120*l.* against an underwriter, who had subscribed 100*l.* for an average and the subsequent total loss; the 100*l.* not being like the penalty in a bond, the limit of the underwriter's liability, but the proportion of the loss he was liable for. That case establishes this principle, that the proper

(*a*) 12 East, 648.
(*b*) 2 Cr. & J. 244.
(*c*) 4 Taunt. 367.

time to estimate the loss, where the *party is put to no expense, is at the expiration of the risk. In the present case the risk expired [*452] when the voyage was put an end to by the sale of the ship, for the purpose of being broken up; and at that time, according to the evidence, the plaintiff was not damnified, by the wales not having been replaced; for, if they had been replaced, bearing in mind the other facts in the case, the ship would still have been sold as a wreck for breaking up. My opinion is, that, if the plaintiff had incurred the expense of replacing the wales, and afterwards sold the ship to be broken up, the money so imprudently laid out would not have been recoverable from the underwriters. The assured is entitled to recover the amount by which the ship is deteriorated by the accident; but, for the reasons already mentioned, that does not comprehend the expense of replacing the wales. Upon this point, therefore, the jury have come to an erroneous conclusion; and consequently, there ought to be a new trial." Rule absolute for a new trial, on payment of costs.

The rule by which an average loss, occasioned by sea-damage is to be ascertained, underwent much discussion; in the case of *Johnson* v. *Sheddon*, (*a*) and a very able and elaborate judgment was pronounced on the occasion by Mr. Justice *Lawrence*, who began that judgment by declaring, that the loss is to be estimated by the rule laid down in *Lewis* v. *Rucker*, that the underwriter is not to be subjected to the fluctuation of the market: that the loss, for which alone he is responsible, is the deterioration of the commodity by sea-damage; and that he is not liable for any loss which may be the consequence of the duties or charges to be paid after the arrival of the commodity at the place of his destination. The parties agreed that the damage was to be ascertained by considering, whether the commodity was a third, a fourth, or a fifth worse; and it was also agreed, that that could only be done by the price at the port of delivery. But the only question was, whether that price was to be *ascertained by the net proceeds, or by the gross produce. But [*453] the Court held, that the calculation was to be made on the difference between the respective gross proceeds of the same goods when sound and when damaged, and not on the net proceeds. The main stress of the argument in favour of the judgment is this, that by taking the net proceeds as the basis of the calculation, instead of the gross proceeds, it will happen, that where equal charges are to be paid on the sound and damaged commodity, the underwriter will be affected by the fluctuation of the market, which he ought not to be. Thus, suppose sound goods, including all charges, sell for 600*l.* the damaged for 300*l.* let the charges on each be 100*l.*, the difference after they are deducted, will be 300*l.* or three-fifths. But let the goods come to a fallen market with the same degree of deterioration, let the sound sell for 300*l.*, the damaged for 150*l.*, and deduct the charges as before, the net proceeds of the one will be 220*l.* the other 50*l.*, so the underwriter will in this case have to pay three-fourths. But as the deterioration is the same in both cases, the underwriter should pay the same, whatever be the state of the market, which he will do if the gross produce be taken, namely, half the valued or invoice price. Another consequence of taking the net produce will be, that the underwriter will be made responsible for a loss not arising from the deterioration of the commodity by sea-damage, but for that loss which the assured suffers from being liable to pay the same charges on the sound and damaged commodity. This will be illustrated by the case put of two ships arriving with the same commodity equally damaged; one being subject to duties and charges, and the other to none: the degree of deterioration being the same, the underwriters should pay alike in both cases. Suppose

(*a*) 2 East, 581.

then the cargoes be deteriorated one-half, and the demand and the state of the market the same, and that the goods, if sound, would sell for 1,000*l.*, but being damaged, for 500*l.*, and the charges to be 200*l.* On those goods, where no charges are to be paid, the insurer will have to pay one-half, or 50*l.* per cent.

[*454] The *goods, where charges are to be paid, being equally good with the other, will sell for the same sum, and when 200*l.* are deducted for charges, will in one case leave a net produce of 800*l.* in the other of 300*l.*; and thus, if the underwriter were to pay according to this calculation, he would pay five-eighths instead of four-eighths, or one-half; not because the one cargo has suffered more than the other by the sea, for the supposition is that the sea-damage is the same in both; but from commodities of unequal value being subjected to equal duties and charges."

The same question came before the Court of Common Pleas in Michaelmas Term, 1802, in the case of *Hurry* v. *The Royal Exchange Company*, (*a*) when that Court fully approved of the rule so ably laid down by Mr. Justice *Lawrence*, and determined that the loss must be calculated upon the gross, and not upon the net proceeds of the goods insured at the port of delivery.

In the case of *Usher* v. *Noble*, (*b*) it was argued, that the rule in *Lewis* v. *Rucker* did not apply to open policies: but the Court held, that the rule for estimating any loss of goods insured by an open policy, is to take the invoice price at the port of loading, together with the premium of insurance and commission, as the basis of the calculation of the value of the goods: and the rule for estimating an average loss in the like case is the same as upon a valued policy, by taking the proportional difference between the selling price of the sound and that of the damaged goods at the port of delivery, and applying that proportion with reference to such estimated value at the loading port to the damaged portion of the goods.

Where in the case of *Bousfield* v. *Barnes*, (*c*) a party had insured his ship with the *London Assurance Company*, for 6,000*l.*, valuing it at 8,000*l.*, and by the policy in question valued it at 6,000*l.*, but only 600*l.* were subscribed,

[*455] Lord *Ellenborough* was of opinion, that on such a valued policy it *was no defence to prove that the assured had received the whole amount of the valuation in this policy from the underwriters on another, if the subject-matter insured be proved to be of a value equal to the sum received, and that sought to be recovered. Thus the plaintiff has only received 6,000*l.*; he has therefore an interest of 2,000*l.* to which he may apply this policy. But, as only 600*l.* have been subscribed upon it, when he recovers that sum, he will still be a loser of 1,400*l.* by the total loss of the vessel.

But in *Irving* v. *Richardson*, (*a*) where a person makes two insurances declaring the same value in each, he cannot recover more than that sum though the subject-matter of the insurance be of sufficient value. Thus in an action for money had and received. The defendant had insured 1,700*l.* on the ship *Swiftsure*, valued at 3,000*l.*, with a company at *Glasgow*, and had afterwards insured 2,000*l.* with the *Alliance Marine Assurance Company*, upon the same ship valued again at 3,000*l.* The ship was lost, and the defendant received the amount of the insurances from both companies. This action was brought to recover the proportion paid by the *Alliance Company* of the 700*l.* the excess of the whole sum paid above the valuation. The ship was proved to be really worth more than 3,700*l.* the sum received on the two policies. There was a question of fact, whether the defendant, who was mortgagee of the ship for less than 3,000*l.* had effected the policy for his own benefit only,

---

(*a*) 3 Bos. & Pull. 308.
(*b*) 12 East, 639.
(*c*) 4 Camp. 228.
(*a*) 1 M. & R. 153.

or for that of the mortgagor also; and it was contended for the defendant, that if the jury thought that the insurance was effected for the benefit of the mortgagor as well as of the mortgagee, the plaintiff was not entitled to recover, and the case of *Bousfield* v. *Barnes* was cited as an authority. The jury found for the plaintiff, on the ground that the defendant had insured his owner's interest only as mortgagee. Lord *Tenterden*, C. J. said, "I was prepared to give my opinion in point of law, if it had been necessary, that this case is not governed by that *cited. There the sum mentioned as the value [*456] was different in the two insurances; here it was the same, I am of opinion that where a person effects two insurances, declaring the same value in each, he is bound by that sum, and cannot receive beyond that sum."

In the case of freight policies the usage at *Lloyd's* is to calculate the loss upon the gross amount, and not upon the net value of the freight. It has been said that the interest on freight ought to be that sum, and no more, which the owner calculates on receiving in case of the safe arrival of the ship: because in case the ship is lost that is all he loses. But the practice is different. (*a*)

This principle was adhered to lately in the case of *Palmer* v. *Blackburne*, (*b*) where the freight which the assured would have had to receive in case of the safe arrival of the ship would have been 3,068*l.*, out of which there would have been a deduction of 699*l.* 9*s.* for seamen's wages, pilotage, light dues, tonnage, duty, and dock dues which they were exempted from paying by the loss of the vessel. At the trial it was proved by merchants of great experience that though open policies on freight were very rare, the uniform custom in settling losses upon them had been to pay the assured on the amount of the gross freight. The jury found a verdict in conformity with the custom, and the Court afterwards admitted the legality of it.

Mr. J. *Park* in his Treatise says, (*c*) "that by the ordinances of *Hamburgh* it is declared, that in case of a damage to goods, the assured is not to open their damaged goods, but in the presence of the assurers or the deputies; but if time and circumstances do not give opportunity to call them, yet the goods must not be opened, but in the presence of a notary and some witnesses: (*d*) but I can find no such regulation in the law of insurance in *England*, nor do I understand that any such is adopted in practice. Indeed it seems to be needless; *because an assured, in order to entitle himself to recover [*457] for an average loss, must prove by disinterested witnesses, to the satisfaction of the jury, the quantity of goods damaged in the course of the voyage. The parties may, however, insist upon being present."

As the common memorandum, which, as I have before observed, is in the last part of the policy, I would have taken it in its order, had it not rather partaken of the character of a mere memorandum as it is, in fact, called, than making part of the regular terms and words of the policy: it is not easy, besides to treat of the subject of "average losses" fully, without taking with us the consideration of the "common memorandum:" which is in the following terms:—

Memorandum.—N. B. Corn, fish, salt, fruit, flour, and seed, are warranted free from "average," unless general, or the ship be stranded. Sugar, tobacco, hemp, flax, hides, and skins, are warranted free from "average" under five per cent.; all other goods, also the ship and freight are warranted free from "average," unless general, or the ship be stranded.

Lord *Abinger*, in his judgment in *Roux* v. *Salvador*, (*a*) to which we have so often referred, says, "The memorandum does not vary the rules upon which

(*a*) See Stev. on Aver. 192.
(*b*) 1 Bing. 62.
(*c*) Park Ins. 237.
(*d*) 2 Mag. 228.
(*a*) 4 Scott, p. 24.

a loss shall be average or total—it does no more than preclude the indemnity for an ascertained average loss, except on certain conditions. It has no application to a total loss, or to the principles by which a total loss is to be ascertained."

It will be necessary to observe here, that most of the goods mentioned in the memorandum, are of a perishable nature; and, therefore, when they are damaged by such natural and inherent principle of corruption in themselves, the underwriters, by the ordinances of most countries are held to be discharged. (*b*) The underwriters we see are not answerable for any average loss, unless it be by way of a general average; and some goods are warranted free under five [*458] per cent., others *under three per cent., unless general or the ship be stranded. (*a*)

And it is usual, to say, when in actions on policies of insurance, which generally contain this "memorandum," that when the ship is stranded, that has the effect of taking the goods of this nature out of the terms and words of the exception in the memorandum.

What shall amount to a stranding of the ship within the meaning of the memorandum, has been the subject of many decisions.

In a case of *Dobson* v. *Bolton*, (*b*) at *Guildhall*, Lord *Kenyon* told the jury, "that ships running on some wooden piles four feet under water, erected in *Wisbeach* river about nine yards from the shore, but placed there to keep up the banks, and lying on such piles till they were cut away, was a stranding within the policy, so as to subject the underwriter to an average loss on corn."

But it is not every touching or striking upon a fixed body in the sea or river, that will constitute a stranding. Thus, Lord *Ellenborough* in the case of *Macdougall* v. *The Royal Exchange Assurance Company*, (*c*) held, that in order to establish a stranding, the ship must be stationary; for that merely striking on a rock, and remaining there a short time, (as in the case then at the Bar, about a minute and a half,) and then passing on, though the vessel may have received some injury, is not a stranding. Lord *Ellenborough's* language is important. *Ex vi termini*, stranding means lying on the shore, or something analogous to that. To use a vulgar phrase, which has been applied to this subject, if it is touch and go with the ship, there is no stranding. It cannot be enough that the ship lay for a few moments on her beam ends. Every striking must necessarily produce a retardation of the ship's motion. If by the force of the ele- [*459] ments *she is run aground, and becomes stationary, it is immaterial whether this be on piles, on the muddy bank of a river, or on rocks on the sea shore: but a mere striking will not do, wherever that may happen. I cannot look to the consequences without considering the *causa causans*. There has been a curiosity in the cases about stranding not creditable to the law. A little common sense may dispose of them more satisfactorily.

But in the case of *Harman* v. *Vaux*, (*a*) it was held, where a ship is forced on shore, or is driven on a bank, and remains on the ground for any time, this constitutes a stranding, without reference to the degree of damage which she thereby sustains.

In another case of *Carruthers* v. *Sydebotham*, (*b*) in the King's Bench, the question of stranding was much considered. By the 52 Geo. 3, c. 39, the

---

(*b*) Ordinances of France, Stockholm, and Hamburgh.

(*a*) And the average losses must amount to three or five per cent. without the charges, in order to render the underwriters liable. Stevens on Average, 231.

(*b*) Sit. after East. 1799. Park Ins. 239. (*c*) 4 Camp. 283.

(*a*) 4 Camp. 429, and see Barrow v. Bell, 4 B. & C. 736. In Baring v. Harkle at Guildhall, 1801, 1 Marsh. 232, Lord Kenyon held, that where a ship was run foul of by two others and driven aground, where she remained an hour, this was not a "stranding."

(*b*) 4 M. & S. 77.

general Pilot Act, the captain of every ship is obliged to take licensed pilots, where they can be had, under a penalty. But sect. 30 provides that no owner or master of any ship shall be answerable for any loss, nor prevented from recovering upon any insurance, by reason of any neglect, default, &c., of any pilot taken on board under any provisions of that act. Thus where a ship, under the conduct of a pilot, in her course up the river to *Liverpool*, was, against the advice of the master, fastened at the pier of the dock basin by a rope to the shore, left there, and she took the ground, and when the tide left her she fell over, by which seed (the subject-matter insured) was damaged: the Court held this to be a stranding, it not being essential to constitute a stranding that it be the consequence of storms, it being a sea peril, and immediately occasioned by sea water upon the strand. (*c*)

*And the Court held, that though this pilot was appointed under a local *Liverpool* Act of 37 Geo. 3, c. 78, yet the general Pilot [*460] Act, above referred to, expressly refers to pilots duly appointed within particular districts. This man was regularly appointed; and sect. 30 of the general act decides, that the misconduct of such an one shall not prevent the assured from recovering upon any insurance.

But it was decided in the case of *Hearne* v. *Edmunds*, (*a*) where it is certain that, in the ordinary course of the navigation, the vessel would, by the flux and reflux of the tide, be left on the mud, that this is not a stranding within the meaning of that term in the policy.

And in a subsequent case of *Rayner* v. *Godmond*, (*b*) Lord Chief Justice *Abbott* takes notice of this distinction. The circumstances of this case were as follows:—In the course of the voyage the ship arrived at a place called *Beal Lock*, and whilst she was there it became necessary, for the purpose of repairing the navigation, that the water should be drawn off. The master placed the vessel in the most secure place he could find, alongside of four other vessels. The water being then drawn off, all the vessels grounded, and the ship in question unfortunately grounded upon some piles in the river which were not known to be there, and the cargo received considerable damage. The part of the navigation where she took the ground was one in which vessels usually were placed when the water was drawn off. At the trial, *Best*, J., was of opinion that these facts amounted to a stranding, and the plaintiff had a verdict. Upon a motion for a new trial, which was refused, *Abbott*, C. J., said, "The case of *Hearne* v. *Edmunds* has relieved my mind from the only remaining difficulty which I felt in this case, which was, lest it should follow from our decision, or from that of *Carruthers* v. *Sydebotham*, that every settling on the ground by a vessel should be deemed a stranding; but that case was decided on a distinction, which leaves *Carruthers* v. *Sydebotham* a valid [*461] *authority; for there the accident happened in the ordinary course of the voyage; and on that ground the underwriters were held not to be liable. Here the loss did not so happen, for we cannot suppose that these canals are so constantly wanting repair, as to make the drawing off of the water an occurrence in the ordinary course of the voyage."

And in the more recent case of *Bishop* v. *Pentland*, (*c*) where the ship in the course of her voyage was compelled to put into a tide harbour, and was there moored alongside a quay, in the usual place for ships of her burthen, it became necessary, in addition to the usual moorings, to fasten her by tackle to posts on the shore, to prevent her falling over upon the tide leaving her. The

---

(*c*) See Thompson v. Whitmore, 3 Taunt. 227.
(*a*) 1 Brod. & Bing. 388. (*b*) 5 B. & A. 225.
(*c*) 7 B. & C. 219.

rope with which she was thus fastened not being of sufficient strength, (*b*) broke when the tide left the vessel, and she fell over upon her side, and was thereby stove in and greatly injured. It was held, that this was a stranding within the meaning of that word in the policy. But that if she had merely taken the ground, without falling over by accident on her side, and been stove in, it would not have been a stranding. And *Littledale*, J., says, "There seems to be some contrariety of opinion as to the meaning of the term 'stranding.' That term, in its ordinary sense, means taking the ground, or being on the strand; but that is not the meaning of the word in a policy of insurance. For this vessel's taking the ground in the first instance was not a stranding within the meaning of the policy. I think it is immaterial whether a vessel takes the ground when she is in the course of, or at the end of the voyage. But when a vessel is on the ground, or stranded, in such a situation as she ought not to be in while prosecuting the voyage on which she is bound, that is a stranding within the meaning of the policy. In *Hearne* v. *Edmunds*, (*c*) the taking the
[*462] ground *was no more than was usual with vessels of the same class proceeding up the river to *Cork*. When the vessel was on the ground, she was in that situation in which such a vessel proceeding on that voyage usually is in when the tide is low. So here, as long as the vessel lay on the ground, fastened to the shore by the rope, she was not stranded; but when the rope broke, and she fell over on her side, and lay on the ground, in that position, I think she was stranded within the meaning of the policy, because she then ceased to be in a situation in which a vessel driven by stress of weather into the port of *Peele* usually is."

In the late case of *Wells* v. *Hopwood*, (*a*) the question as to what constitutes a "stranding" was fully considered, and all the cases on the subject commented on by the learned Judges, in giving their opinions.

It was held by Lord *Tenterden*, C. J., *Littledale*, J., and *Taunton*, J., that the facts stated constituted a "stranding," within the meaning of that word in the policy. *Parke* J., (now Mr. Baron *Parke*,) was of a different opinion.

The facts of this case were these. The ship sailed from *London* in *June*, and on the 21st of that month arrived at *Hull* harbour, which is a tide harbour, and proceeded to discharge her cargo at a quay on the side of it: this could be done at high water only, and could not be completed at one tide. At the first low tide the vessel grounded on the mud; but on a subsequent ebb, the rope by which her head was moored to the opposite side of the harbour stretched, and the wind blowing from the east at the time, she did not ground entirely in the mud, which it was intended she should do, but her fore part got on a bank of stones, rubbish, and sand near the quay, and the vessel having strained, some damage was sustained by the cargo, but no lasting injury done to the vessel.

Lord *Tenterden*, C. J.—"Several of the cases hitherto decided on this sub-
[*463] ject are, as to their facts, very near to *each other, and not easily distinguishable. But it appears to me that a general principle and rule of law may, although not explicitly laid down in any of them, be fairly collected from the greater number. And that rule I conceive to be this: where a vessel takes the ground in the ordinary and usual course of navigation and management in a tide river or harbour, upon the ebbing of the tide, or from natural deficiency of water, so that she may float again upon the flow of tide or increase of water, such an event shall not be considered a stranding within the sense of the memorandum. But where the ground is taken under any extraor-

---

(*b*) But though the accident was to be traced to the negligence of the crew as a remote cause, yet as the proximate cause of the loss was one of the risks insured against the underwriters were held liable. See *ante*, p. 269.

(*c*) 1 Brod. & Bing. 388.

(*a*) 3 B. & Ad. 20.

dinary circumstances of time or place, by reason of some unusual and accidental occurrence, such an event shall be considered as a stranding within the meaning of the memorandum. According to the construction that has been long put upon the memorandum, the words 'unless general, or the ship be stranded,' are to be considered as an exception out of the exception as to the amount of an average loss, provided for by the memorandum, and, consequently, to leave the matter at large according to the contents of the policy; and as every average loss becomes a charge upon the underwriters, where a stranding has taken place, whether the loss has been in reality occasioned by the stranding or no, the true legal sense of the word 'stranding' is a matter of great importance in policies upon goods. It appears to me, that upon the facts of this case, the event which has happened to this ship is within the second branch of the rule as above proposed. If the rope had not slackened, and the wind had not been in such a direction as it was, the vessel would have remained safe during the night; for, although raised by the influx of the tide, she would at its ebb have grounded again on the soft and even bottom over which she had been placed. The events that occurred, unusual and accidental in themselves, caused the vessel to quit that station, and go in part to another, where, upon the ebbing of the tide, her fore part rested on a stony bank, so as to be above her remaining part, *and to cause the straining by which the cargo was injured by the influx of water through the opening of the planks. I should [*464] observe, that my judgment in this case is not founded upon the fact of injury to the cargo, or of the want of injury to the ship; I do not consider either of these circumstances as being properly an ingredient in the question."

And Mr. Justice *Littledale*, referring to the recent decision of *Bishop* v. *Pentland*, said, "But for the breaking of the tackle, the ship would have remained in the same situation that ships usually are in *Peele* harbour during ebb. In that case, also, the vessel came to the ground in a place where, in the ordinary course of proceeding, she was not meant to be, and came there by a peril of the sea, and by the grounding received damage. In both cases the damage arose from a rope, in the one instance breaking, in the other stretching. In that case it is true that the vessel fell on her side, whereas in this she grounded, without falling over; in that case, too, she was materially injured, whereas here she was only injured for a few hours, and not permanently; but these differences do not appear to me to be of such importance as to warrant a different judgment."

For the reasons which led Mr. Justice *Parke* to differ from the rest of the Judges in this case, the reader is referred to the full report of that learned Judge's opinion. Suffice it to say, that the grounds upon which that opinion seems to have been given, were, that the vessel had been laid on the ground by the voluntary act of the master and crew, in the course of a voyage in which the usage was to lay vessels on the ground, and was done in pursuance of that usage, and the vessel was uninjured thereby. (*d*)

Upon this clause in the policy there have been several determinations, in all of which it has been uniformly held, that the underwriters can in no case be answerable for an average loss to such commodities unless the ship be stranded. *It may also be proper to premise that corn is the general term, and includes many particulars; peas and beans, (*a*) and malt, (*b*) [*465] have been held to come within the meaning of the word, though rice has been held not to be so considered. (*c*)

(*d*) See also Kingsford v. Marshall, 8 Bing. 458.
(*a*) Mason v. Skurray, *vide post*.
(*b*) Moody v. Surridge, sittings before Lord Kenyon, after Hill. 1798. Park Ins. 245.
(*c*) Scott v. Bourdillon, 2 New Rep. 213.

But, in the Court of Common Pleas, Mr. Justice *Wilson* was of opinion, that the term salt, used in the memorandum, did not include saltpetre. (*d*)

In *Wilson* v. *Smith*, (*e*) an action upon a policy of insurance was brought for the recovery of 56*l.* 19*s.* 8*d.* per cent., being the damage received by a cargo of wheat on board the *Boscawen*, insured at and from *Lancaster* to *Rotterdam*. The wheat was valued, by agreement, at 30*s.* per quarter. The policy was in the ordinary form, with the usual clause at the bottom, that corn, fish, fruit, &c., should be warranted free from average, unless general, or the ship be stranded. The defendant underwrote this policy for 100*l.* The defendant having pleaded the general issue, the cause came on to be tried; and a special case was reserved for the opinion of the Court, stating that, after the ship's departure from *Lancaster* and before her arrival at *Rotterdam*, she met with a violent storm; that she was, by and through the force of winds and stormy weather, obliged to cut away and leave her cable and anchor, for the safety of the ship and cargo; that she was also greatly damaged, and obliged to run to the first port to refit; that the expense of refitting the ship amounted to 38*l.* 15*s.* per cent., which the defendant in this case had paid, being a general average. The case then states, that the hatches were not opened at *Liverpool*; (the place where she had gone to repair) but the ship being refitted, proceeded on her voyage, and arrived at *Rotterdam*, where her cargo of wheat was landed; that, upon her unloading it, it appeared that it had received average damage by the said storm to the amount of 56*l.* 19*s.* 8*d.* per cent.

[*466] *The single question was upon the true construction and meaning of the words "free from average, unless general, or the ship be stranded"—whether the plaintiff, as there had been a general average, could, under the circumstances, recover in this action for the damage of 56*l.* 19*s.* 8*d.* per cent. average loss, though the ship had not been stranded. After two arguments, the Court gave judgment for the defendant.

Lord *Mansfield*.—"Policies of insurance, according to their present form, are very irregular and confused; an ambiguity arises in them from using the same words in different senses, particularly in the use of the word average. It is used to signify a contribution to a general loss, and it is also used to signify a particular average loss. But whether it be considered in one or other of these senses, it will not avail the plaintiffs in this case. For if it here signify a contribution, the insurer is to be free from contribution, unless the contribution be general. If it signify loss, then plainly it is warranted free from all particular loss. The insurer is liable to all losses arising from the ship being stranded, and in all cases where there is a general average; but all other average losses are excluded by the express terms of the policy. The word 'unless,' means the same as 'except,' and never can be construed as a condition in the sense that the counsel for the plaintiffs would put upon the word 'condition,' namely, to be free from average loss, unless in two events, viz: a general average, or the stranding of the ship; but if either of those events did happen, then to be liable to all other average. The words 'free from average, unless general,' can never mean to leave the insurer liable to any particular damage. It is clear, then, that the plaintiff ought not to recover; and that judgment ought to be given for the defendant."

Cocking v. *Fraser* (*a*) is a case of importance on this subject, reported by Mr. J. *Park*, though the decision is doubtful. It was an action brought upon

[*467] a policy of insurance to recover against the underwriters for a total loss of the cargo, *upon a voyage at and from *St. John's*, *New-*

(*d*) Journu v. Bourdieu, sittings after East. Term, 27 Geo. 3. Park Ins. 245.
(*e*) 3 Burr. 1550.
(*a*) B. B. 25 Geo. 3. Park Ins. 247.

foundland, to her port of discharge in *Portugal*. The jury found a verdict for the plaintiff, subject to the opinion of the Court upon a special case.

The case states, that the ship sailed from *Newfoundland* on the 2nd of *December*, 1783, with a cargo of fish; that on the 11th they hove overboard forty quintals, for the general preservation of the ship and cargo; that on the 20th they threw over twenty-six quintals more, for the same purpose. The ship had exceeding bad weather, till her arrival at *Lisbon*, on the 10th of *January*, 1784, when a survey was had, at the request of the captain, who was also the consignee of the goods, by the Board of Health; and it appeared to them, and so the fact was, that the cargo was rendered of no value through the dangers of the sea. The ship did not proceed from *Lisbon* upon her destined voyage. The defendant has paid into Court the amount of average loss sustained by the ship, and also the general average upon the cargo.

Lord *Mansfield*.—"Most litigations arise from improper statements of cases, and from not properly defining terms. This clause relative to fruit and fish, is now a very old one in policies of insurance. The assurer undertakes for all losses, except particular damage, unless the ship be stranded: he engages against a total loss. What is a total loss? The total loss of the thing insured is the absolute destruction of it by the wreck of the ship. The fish may all come to port, though from the nature of the commodity, it may be damaged, it may be stinking: (*a*) still, as the commodity specifically remains, the underwriter is discharged."

"The case of *Cocking* v. *Fraser* has had many observations made upon it, and it has been supposed by very able judges to have gone too far. Lord *Kenyon*, in the case of *Burnett* v. *Kensington*, (*b*) said, 'that he could not subscribe to *the dictum of Lord *Mansfield*, in *Cocking* v. *Fraser*, [*468] that if the commodity specifically remain, the underwriter is discharged.' And Lord *Alvanley*, in delivering his opinion in *Dyson* v. *Rowcroft*, (*a*) supposes himself at liberty to consider the case of *Cocking* v. *Fraser* as something less strong than it appears to be, in consequence of what fell from Lord *Kenyon*. But, with the greatest possible deference to both these very learned Judges, there is nothing objectionable in the doctrine laid down in *Cocking* v. *Fraser*, if the circumstances of that case, and to which circumstances alone Lord *Mansfield's* doctrine is applicable, are considered. In the case of *Cocking* v. *Fraser* there was no stranding, as in *Burnett* v. *Kensington*; there was no disability in the ship to proceed to her destination, as in *Dyson* v. *Rowcroft*, which, therefore, created a total loss of the voyage. In *Cocking* v. *Fraser*, it is most evident, nothing being stated to the contrary, that the reason why the ship did not proceed to her port of destination was, because the cargo was of no value, through perils of the sea; this, therefore, was a voluntary and not a compulsory abandonment of the further prosecution of the voyage, which will not, therefore, warrant an abandonment as for a total loss, nor could the assured recover as for an average loss, because the cargo was one enumerated in the policy. I have ever understood it to be due to every Judge to take his words with reference to the case before him, and not to state his doctrine in the abstract, or as a general proposition, without allusion to the particular circumstances of the case then in judgment. Looking at the case of *Cocking* v. *Fraser* in this view, Lord *Mansfield's* doctrine is no more than this:—'If the commodity (being one of the enumerated cargoes) specifically remain, though it may be so damaged as to render it on that account the subject of total

---

(*a*) If the fish was stinking, the loss must have been total, for it must have never been sold, and in most countries would have been burnt, if exposed for sale, by authority of the state.

(*b*) *Post*, p. 478.

(*a*) *Post*, p. 469.

[*469] loss, (*b*) if it had not been included in the memorandum, the *underwriter is discharged, because there has neither been a stranding, nor has the voyage of the ship been put an end to by any of the perils mentioned in the policy, but because the assured did not choose, on account of the state of the cargo, to proceed to the port of destination.' The wisdom of such a decision is apparent, for otherwise it would be a constant temptation to the assured, wherever a cargo of this description was not likely to reach the port of destination in a sound state, by giving notice of abandonment, to throw a loss upon the underwriters, by voluntarily giving up the further prosecution of the voyage, to which they are not liable by the terms of the memorandum." (*a*)

Dyson and others v. *Rowcroft*, (*b*) is a leading case on this subject. It was an action on a policy on fruit on board the ship *Tartar*, at and from *Cadiz* to *London*, with the usual memorandum. The plaintiffs were interested in the fruit. The *Tartar* sailed upon the voyage insured with the fruit on board: but having met with tempestuous weather and contrary winds, was forced to put into *Palma*, and afterwards into *Santa Cruz*. In the course of this voyage the fruit received so much damage from the sea water, that, on its arrival at *Santa Cruz*, it was rotten and stunk to so great a degree, that the government prohibited the landing it, and it was, therefore, thrown overboard. The ship also was so much damaged in the course of the voyage, as to be unable to proceed upon the voyage, and was necessarily sold. On this special case, the question came before the Court.

Lord *Alvanley*.—"If I understand the policy, as restrained by the memorandum, the underwriter agrees, that all commodities shall arrive safe at the port of destination, notwithstanding the perils insured against; but that he will not be liable to pay for any average loss on fish, or the other articles contained in the memorandum, because those commodities being liable to deterioration, from many circumstances independent of the peril insured against, he would [*470] continually be harrassed with claims for average loss alleged to have arisen *from the perils mentioned in the policy. Unless, therefore, the consequence of the damage sustained be the total loss of the commodity, the underwriter does not agree to be answerable; but if the commodity be totally lost to the assured, he undertakes to pay. If this be not the meaning of the memorandum, it is badly expressed; and the underwriters would have done better if they had said, that they would not be answerable, unless the commodities enumerated actually went to the bottom. The question is, what is a total loss? I admit that the circumstances of cases like the present are generally suspicious. If the voyage be protracted, deterioration necessarily takes place; and it becomes the interest of the captain and mariners to turn the injury into a total loss. But this is a matter for the consideration of a jury. We ought, indeed, to look at the case with some suspicion, where there is so much temptation to throw the cargo overboard. But here it is found that the necessity of so doing arose from sea water shipped during the course of the voyage; and that the commodity was in such a state, that it could not be suffered to remain on board consistently with the health of the crew. In consequence of this necessity, therefore, the commodity was annihilated, by being thrown overboard. Had it not been so annihilated it would have been annihilated by putrefaction: and is it not as much lost to the assured, by being thrown overboard, as if the captain had waited until it had arrived at complete putrefaction? The case of *Cocking* v. *Fraser* was the only thing which raised any

---

(*b*) Mr. J. Park's observations are certainly incorrect, for if the fish became a total loss, the assurers must pay for them, as only average losses are excepted by the memorandum, except on certain conditions. And this case of Cocking v. Fraser in wrongly decided.

(*a*) Park Ins. 248. (*b*) 3 B. & P. 474.

doubt in my mind, and it is certainly a very strong case. But the authority of that case is much shaken by the observation of Lord *Kenyon* upon it, in *Burnet* v. *Kensington*. I suspect that the words 'of no value,' applied to the cargo in the case of *Cocking* v. *Fraser*, are somewhat too large, and that the fact was, not that the cargo was in such a situation as to make it impossible to preserve it, but that it was so much damaged as to be no longer valuable to the owners, because it was not worth carrying to the port of destination. Lord *Kenyon*, speaking of *Cocking* v. *Fraser*, says, that he cannot subscribe to the opinion there *given, that if 'the commodity specifically remain, the underwriter is discharged.' I think myself, therefore, at liberty [*471] to consider the case of *Cocking* v. *Fraser*, as something less strong than it appears to be. The question then is, whether the loss, which has happened, be not as much a total loss as if the waves had carried the cargo overboard, or, as if it had been directly prevented from arriving at the port of destination, by some of the perils insured against? I never have understood that the underwriters insure fish against no perils, which do not end in a total annihilation of the commodity. When the loss arises from capture, the commodity remains in existence in the hands of the enemy; and yet this loss is as much within the policy as a loss arising from the wreck of the ship. I must now take it, that the circumstances, under which the cargo in this case stood, were such that sea-damage had so operated as to make it impossible for the captain to keep it any longer on board. Whether the cause of the loss were direct or indirect, it produced a total annihilation of the commodity." The other Judges concurred, and there was judgment for the plaintiffs.

In the case of *M'Andrews* v. *Vaughan*, (*a*) which was an insurance on fruit from *Lisbon* to *London*, it appeared that the ship was captured, and recaptured, brought into *Portsmouth*, and afterwards arrived at *London:* but the cargo, by the capture, recapture, and consequent length of the voyage, had sustained a damage of 80*l.* per cent. The assured, however, never heard of the capture till the ship was safe at *Portsmouth*, and then he offered to abandon.

Lord *Kenyon*.—"As there has been no stranding, there cannot be a recovery for an average loss. The question then is, whether the assured can recover for a total loss? Had the plaintiff heard of the capture only, he might have abandoned: but he hears nothing of the accident till the ship is in safety. The cargo arrives at the port of destination; and though it is good for very little, yet it has invariably been held that the voyage must either be lost, or the cargo, if it *be one of those mentioned in the memorandum, must be wholly and actually destroyed to entitle the assured to recover." [*472] The plaintiff was nonsuited.

In the case of *Mason* v. *Skurray*, (*b*) which was an action brought on a policy of insurance on goods, on board the *Happy Recovery*, at and from *London* to *St. Augustine*, to recover for a total loss. The cargo was peas, which, in a former case on the same policy, were held to fall within the general denomination of corn, in the memorandum at the foot of the policy. The peas arrived at the place of destination; but being much damaged, the produce of them was less by about three-fourths than the freight, which on account of the ship's arrival at the port of discharge, became due. The defence set up by the underwriter was, that if the goods mentioned in the memorandum arrive at the market, though a loss amounting to a total one has happened, the underwriters are not liable. Four or five witnesses conversant in settling losses upon policies being called, proved that the usage was, in such cases, to hold the underwriters discharged.

(*a*) Sit. at Gild. after Mich. 1793. Park Ins. 252.
(*b*) Sit. at Hil. Term, 1780, at Guild. Park Ins. 253.

Lord *Mansfield* told the jury—"This was a question of consequence, and it turned upon the general import of the exception: the witnesses examined have put it on that point; and they hold, that if the specific thing come to the port of delivery, the underwriter cannot be called on. How did this matter stand before the year 1749? When the policy was general, and operated as an indemnity, there was little difference between a total and an average loss; which, he observed, was prior to the clause in question. But the cases now stand upon the memorandum, which is in very general words. The question is, whether the usage has not explained the generality of the words? If it has, every man who contracts for a policy under usage, does it as if the point of usage were inserted in his contract in terms. The witnesses examined all swear it to be understood, that if the specific thing come to market, the memorandum warrants the insurer to be free *from any demands for an average loss." The jury found for the defendant.

[*473]

But in the case of *Davy* v. *Milford*, (*a*) where the underwriters are exempt by the memorandum, from an average loss, they may still be liable for the total loss of part of the goods insured, if the goods be of a description to admit of a divisibility, and packed in distinct packages. (*b*) Thus in the case of a cargo of flax insured by a valued policy, free from particular average, where the ship was wrecked before she arrived at her port of destination, and the insured did not abandon, but laboured to save the cargo, and in fact saved a part, (one-sixteenth) though much damaged, no entire packet having come on shore, and that which did come, being loose and wet, and requiring, as flax is a perishable commodity, to be sold on the spot, the insured was held to be entitled to recover as for a total loss of that part, which was in fact totally lost, but not for the remainder, which was saved in specie though deteriorated.

But in the case of *Hedbury* v. *Pearson*, (*c*) in which the insurance was declared to be upon "hogsheads of sugar," when, in the course of the voyage the ship was stranded, and bilged, but every one of the fifty-four hogsheads which the aforesaid ship had on board, was saved, and in every hogshead there were some loaves of sugar, although by far the greater part had been washed out; the jury having stated their opinion that the loss was an average one, and found accordingly; the Court held that they were right in so doing. They distinguished this case from the case of the flax, for there no entire package came to shore; here each hogshead had some sugar in it saved; if any of the hogsheads had *been entirely lost, there would have been a total loss of that part, which the insurer would have been liable.

[*474]

The import of the general memorandum is in fact usually modified by an express stipulation to pay "average on each species of produce, or package of manufactured goods, or on each ten, fifteen, or twenty hogsheads of sugar," &c. (as the agreement may be) the effect of which is to give the insured a right to claim average separately on each species, if it amounted to three or five per cent., although there may not have been a three or five per cent. loss upon the whole. (*a*)

But the effect of this stipulation is not to prevent the assured from estimating the average on the whole cargo, if the loss altogether amounts to a three or five per cent. average on the whole, but it is intended to bestow on him the further

---

(*a*) 15 East, 559.

(*b*) In Lewis v. Rucker, 2 Burr. 1170, Lord Mansfield says, "If part of the cargo capable of a several and distinct valuation at the outset be totally lost, as if there be one hundred hogsheads of sugar, and ten happen to be lost, the insurer must pay the prime cost of those ten hogsheads, without any regard to the price for which the other ninety may be sold."

(*c*) 7 Taunt. 154.

(*a*) See Stevens on Aver., p. 184.

benefit of enabling him to claim one or several losses of three or five per cent. on one or several packages, which he could not have done without such an express stipulation.

Thus in the case of *Hagedorn* v. *Whitmore*, (*a*) where a policy was effected upon some packages of linen (average being payable separately on each) and a loss having taken place amounting to twenty-two per cent. upon the whole cargo, most of the packages having been injured, but many of the pieces in each particular package remained sound, it was contended, on behalf of the underwriter, that although by the general memorandum he would have been bound to pay an average loss sustained by the linen in a mass, if the average exceeded three per cent., yet that, the special clause being inserted, his claim was limited to a calculation upon each package separately, and that he was only entitled to claim for a loss upon those packages which were actually damaged. But Lord *Ellenborough* said, "that this clause was introduced for the benefit of the assured, and did not, as had been argued, oust the plaintiff's claim to general average." His Lordship afterwards stated his opinion that, *though one or more entire packages were uninjured, they were [*475] still to be included in the average.

And in the case of *Blackett* v. *Royal Exchange Assurance Company*, (*b*) it has likewise been decided that upon the construction of the memorandum "free from average, under three per cent. unless general," if several average losses less than three per cent. individually take place, the aggregate, however, of which, amount to the three per cent. or more, the underwriter is liable. And Lord *Lyndhurst*, who delivered the judgment of the Court, said, "that the memorandum was in the nature of an exception, and was to be taken most strongly against the party for whose benefit it was introduced."

But in the very recent case of *Hills and another* v. *The London Assurance Company*, (*c*) where an insurance was effected upon a cargo of wheat, shipped in bulk, and valued at 1,600*l.*, warranted free from average, except general, or the ship be stranded on the voyage; the ship met with tempestuous weather, and made considerable water; and in pumping it out, wheat to the value of about 75*l.* was pumped out with the water, and lost. It was held that the plaintiffs could not recover as for a total loss of the part so lost; and Lord *Abinger* said, "that the law had been settled in many cases before, that where the insurance is upon each packet separately, it is to be treated as a total loss upon each package lost; but when it is an insurance upon the bulk, unless the loss exceeds a certain value, there is no average loss, and there cannot in such a case be a total loss of a portion only of the cargo."

In the case of *Nesbitt* v. *Lushington*, (*d*) which was an action on a policy on wheat and coals, the declaration stated the loss to be by detention. It appeared in evidence that the ship was forced by stress of weather into *Ely* harbour in *Ireland*, and there happening to be a great scarcity of corn there at that time, the people came on board the ship *in a tumultuous [*476] manner, took the government of her from the captain and crew, and weighed her anchor, by which she drove upon a reef of rocks, where she was stranded, and they would not leave her till they had compelled the captain to sell all the corn (except about ten tons) at a certain rate. The ten tons were lost in consequence of the stranding, by which it was damaged, and obliged to be thrown overboard. The ship afterwards arrived, with the rest of the cargo, at the place of destination. A verdict was found as for a total loss. A motion was made for a new trial.

(*a*) 1 Stark. 157.
(*b*) 2 Cr. & J. 244; 2 Tyr. 266.
(*c*) 5 M. & W. 569.
(*d*) 4 T. R. 783.

Lord *Kenyon* said—"This being a policy upon corn, the memorandum states that the underwriter will not be liable for any average, unless general, or the ship be stranded. And I am of opinion that this is not a general average, because the whole adventure was never in jeopardy. There is no pretence to say, that the persons who took the corn intended any injury to the ship, or any other part of the cargo, but the corn, which they wanted in order to prevent their suffering in a time of scarcity. Therefore the plaintiffs could never have called on the rest of the owners to contribute their proportion, as upon a general average. On the meaning of the memorandum I have no doubt. The articles there enumerated are of a perishable nature: as it might be difficult to ascertain whether their being damaged arose from any accident, or from the nature of the articles themselves, this memorandum is inserted in all policies, to prevent disputes; and by it the underwriters expressly provide they will not pay any average unless general, or the ship be stranded. When a ship is stranded, then the underwriters agree to ascribe the loss to the stranding, as being the most probable occasion of the damage, though that fact cannot always be ascertained. Therefore here all the damage done to the cargo thrown overboard may be ascribed to the stranding: but the objection is, that the declaration imputes the loss to another cause."

[*477] *Mr. Justice *Buller*.—"With respect to the objection, that this does not fall within the reason of the memorandum, there are only two instances, in which the owner may recover an average loss on the articles there enumerated: either where the average is general, or where the loss arises from the stranding of the vessel. Now this cannot be said to be a general average, for the reasons already given. And as to the other instance of stranding, the plaintiffs are entitled to recover for any loss occasioned to the cargo in consequence of the stranding, provided it be a direct and immediate consequence of stranding; (*a*) but they cannot recover for that which was taken by the mob, for that was not the consequence of the stranding, but on the contrary, the stranding was occasioned by the mob coming on board for the corn. The rioters took possession of the ship in order to get at the cargo; but this loss cannot be ascribed to the stranding. Suppose the mob had taken out one hundred quarters of corn before the ship had been stranded, and had used no threat to destroy the whole if it were not delivered to them, it is clear that the underwriters would not be liable. Then the fact of their taking the corn after she was stranded is as much unconnected with that circumstance as if it had been before. But the loss which happened to that part of the cargo which was thrown overboard, being ascribable to the stranding and being a direct and immediate consequence of the peril insured against, might have been recovered, had there been any count in the declaration applicable to a loss by stranding."

Still it remained a question, which has been much agitated in *Westminster* Hall, whether the words "unless stranded" were to operate as a condition, so as to allow the assured to recover for an average loss of the commodity, if that event happened, though it could be shewn demonstrably that no part of the loss had arisen immediately from the act of stranding. Lord *Kenyon*, in a

[*478] case before him at *Nisi Prius*, (*b*) *upon this subject, had been of opinion, that as the general mode of construing deeds, to which there are exceptions, was to let the exceptions control the instrument, as far as the words of it extend, and no further; and then upon the case being taken out of the letter of the exception, the deed operates in its full force; so the stranding of the ship put fish in the same condition as any other commodity not men-

(*a*) See Burnett v. Kensington, *post*, that this doctrine is now exploded.
(*b*) Bowring v. Elmslie, sittings after Trin. 1790. Park Ins. 262.

tioned in the memorandum, for otherwise there would be very considerable difficulty in ascertaining how much of the loss arose by the perils insured against, and how much by the perishable nature of the commodity, which was the very thing the memorandum intended to prevent.

This point, however, was settled in the cause of *Burnett* v. *Kensington*, (*a*) which, as Mr. J. *Park* says, was as much discussed as any case that ever arose at *Guildhall*, and which, after three trials by Jury, and two special arguments upon the case reserved at the last of those trials, was at last unanimously decided by the whole Court, in favour of the assured. It was an insurance on fruit, the policy containing the usual memorandum, and the declaration stated the loss to be, that the vessel by the perils of the sea was stranded, bulged, and destroyed, whereby the goods were lost. The case stated that the vessel, in the course of her voyage, struck upon a sunken rock, on which she did not remain, but in consequence of it, several of her planks were started, and the water immediately flowed into the hold and over the cargo; that on the same day she was stranded at *Scilly*, by direction of the pilot, for the preservation of ship and cargo. While she continued on the beach, the water again flowed in over the cargo, which was very much damaged, and a small part was left at *Scilly* as wholly unfit for use. The ship received no damage in consequence of the stranding. The damage she received was entirely from the rock on which she struck: part of the damage the cargo received was occasioned by the water flowing into the ship, previous to her being laid *on the [*479] beach, and part was occasioned by the water that flowed in afterwards; but the cause of the water flowing in arose entirely from the ship striking on the rock, and not from any mischief done to the ship by the stranding. After full argument, and consideration of all the cases,

Lord *Kenyon* said—"The words of this policy are in general terms, including all cases; then comes this memorandum, 'corn, fruit, &c., unless general, or the ship be stranded.' This, therefore, lets in a general average: and I do not know how to construe the words grammatically, but by saying, that if the ship be stranded, then it destroys the exception, and lets in the general words of the policy. If a general provision be made in any deed or instrument, and it is there said that certain things shall be excepted, unless another thing happen which gives effect to the general operation of the deed, if that other thing do happen, it destroys the exception altogether. My two opinions that have been referred to, the one in the *Nisi Prius* case, (*b*) and the other in *Nesbitt* v. *Lushington*, have no weight with me as judicial authorities; but I confess I have not been able to extricate my mind from the reasoning that led me to the conclusion of those cases. Without inquiring into the reasons for introducing this exception, on the grammatical construction of the whole, I have no doubt." His Lordship then went into a consideration of the cases of *Cantillon* v. *The London Assurance Company*, *Wilson* v. *Smith*, and *Cocking* v. *Fraser*; and proceeded—"If it had been intended that the underwriters should only be answerable for the damage that arises in consequence of the stranding, a small variation of expression would have removed all difficulty; they would have said, 'unless for losses arising by stranding.' But in the body of the policy they have insured against all losses from the causes there enumerated, which include stranding; and then follows this memorandum, the evident meaning of which is, free from average, unless general, or unless the ship *be [*480] stranded; so that if the ship be stranded, the insurers say they will be answerable for an average loss. That appears to me to be the true sense and the grammatical construction of the policy; and therefore I am bound

(*a*) 7 T. R. 210.

(*b*) Bowring v. Elmslie, *supra*.

to give the same opinion I formerly gave, not because I gave that opinion, but because I am convinced by the reasoning that led to it."

Ashurst, *Grose*, and *Lawrence*, Justices, also delivered their opinions; and judgment was given for the plaintiff.

But it has been decided that this condition is to be construed strictly, and that the stranding of a lighter, by which goods were taken from the ship to the shore, was not such a stranding of the ship as to bring the goods, whilst on board the lighter, within the warranty to which the exception, "unless the ship be stranded," applied. (*a*)

In the recent case of *Roux* v. *Salvador*, (*b*) the Court of Common Pleas held, that, although the general principle laid down in *Burnett* v. *Kensington*, that if the ship be stranded the insurer is liable for any average damage, though quite unconnected with the stranding, could not be disputed, yet they held that the stranding must take place at some period between the limits of the risk attaching and ceasing upon the goods the subject of the memorandum; and that, as the liability of the underwriter on goods commenced with the putting of them on board, and ceased with their being discharged and safely landed, or by any other legal termination of the adventure, that the clause in the policy relating to the stranding of the ship ought to be construed with the same restriction; and that the stranding, which was made the condition of letting in an average loss, ought, upon the ordinary rules of construction, to mean, a stranding which takes place after the adventure had commenced, and before it had terminated. And they held that in this case, where the stranding took place at a period during the voyage after the goods had, by the occurrence of acci-

[*481] dental circumstances, been *landed and disposed of, and the respective rights of the underwriter and assured ascertained, that this was not such a happening of the contingent event as would destroy the exception, and let in the general words of the policy. And the Court of Error, in the same case, (*c*) though they did not decide upon this point, nevertheless intimated the like opinion.

II. When the quantity of damage sustained in the course of the voyage is known, and the amount which each underwriter upon the policy is liable to pay is settled, it is usual for the underwriter to endorse on the policy, "adjusted this loss at so much per cent.," or some words to the same effect. This is called an adjustment.

1. It has been held by Lord *Ellenborough*, that if an agent had subscribed the policy, and had authority so to do, he has also authority to sign the adjustment. (*d*)

2. It has been determined that, after an adjustment has been signed by the underwriter, if he refuse to pay, the owner has no occasion to go into the proof of his loss, or any of the circumstances respecting it. This, it is said, has been the invariable custom upon this subject; which seems perfectly just, as the underwriter has under his hand expressly admitted that the plaintiff has sustained damage to a certain amount. To be sure, if any fraud were discovered in obtaining the adjustment, that might be a ground for setting it aside; but, supposing the transaction fair, as we must always do till proof is given to the contrary, the rule of not suffering the adjustment to be contradicted is fair and equitable.

In the case of *Hogg* v. *Gouldney*, (*e*) an action was brought by the plaintiff against the defendant on a policy of insurance, which the latter underwrote in

---

(*a*) Hoffman v. Marshall, 2 Scott, 564; 2 B. N. C. 383.
(*b*) 1 Scott, 491; 1 B. N. C. 536. (*c*) 4 Scott, 23; 3 B. N. C. 276.
(*d*) Richardson v. Anderson, sit. after Mich. 1805, 1 Camp. 43, note.
(*e*) Sit. after Trin. 1745, at Guild. Beawes Lex. Mer. 310.

November, 1743, on the ship *George and Henry*, Captain *Bower*, at and from *Jamaica* to *London*, with a warranty annexed to the policy, that the ship should sail from *Jamaica* with the fleet that *came out under convoy of the *Ludlow Castle* man-of-war. The ship sailed with the [*482] fleet under that convoy, but was damaged so much as to oblige her to bear away for *Charlestown*, where she was condemned and broken up. The plaintiff demanded his insurance; and all the underwriters, being satisfied of the truth of the case, paid their loss, except the defendant, who went so far as to settle it, and, according to the custom upon these occasions, underwrote the policy in these words, "Adjusted the loss on this policy at ninety-eight pounds per cent., which I do agree to pay one month after date. *London*, 5th *July*, 1745, *Henry Gouldney*."

When the note became due, he insisted on fuller proof, particularly of the ship's sailing with convoy, and her condemnation; but as it always was the custom, after adjustment and a promise to pay, never to require any further proof but to pay the loss, and Lord Chief Justice *Lee* being of opinion that this was to be considered as a note of hand, and that the plaintiff had no occasion to enter into the proof of the loss, the jury found a verdict for the plaintiff. The same rule was pursued in the following year, in another case, before Lord Chief Justice *Lee*, between *Hewitt* and *Flexney*. (*a*)

The words used by Lord Chief Justice *Lee* are extremely large; and perhaps the true rule upon the subject may be better collected from the two following more modern cases:—

Case on a policy of insurance on ship and goods from *London* to *Shelborne*, in *Nova Scotia*. (*b*) The policy had been adjusted by the defendant at 50*l.* per cent., and it was contended that he was now bound by that adjustment. On the other hand, it was argued, that the adjustment was not binding; and that, if it were, it ought to have been declared upon specially.

Lord *Kenyon* said that he did not think it necessary to declare on the adjustment specially that it was *primâ facie* evidence against the defendant; but, if there had been any *misconception of the law or fact upon which [*483] it had been made, the underwriter was not absolutely concluded by it. This turned out to be the case; and there was a verdict for the defendant.

So in a still later case of *De Garron* v. *Galbraith*, (*c*) the plaintiff went to trial, having no other evidence to produce but the adjustment: and the witnesses who proved it swore, that doubts soon after they had signed it arose in the minds of the underwriters, and they refused to pay; upon which Lord *Kenyon* said, that under these circumstances the plaintiff must go into other evidence, which not being prepared to do, he was nonsuited. In the following Term a motion was made to set aside the nonsuit, upon the ground that an adjustment was *primâ facie* evidence of the whole case, and threw the *onus probandi* upon the underwriter, and that it amounted to no more than proof of the defendant's subscription to the policy.

Lord *Kenyon*.—"I admit the adjustment to be evidence in the cause to a certain extent; but I thought at the trial, and still think, that when the same witness who proved the signature of the defendant to the adjustment said, that doubts, soon after the adjustment took place, arose in the minds of the underwriters as to the honesty of the transaction, and they called for further proof, the plaintiff should have produced other evidence; and that shutting the door against inquiry after an adjustment, would be putting a stop to candour and fair dealing amongst the underwriters." The rule was refused.

(*a*) Beawes Lex. Merc. 308.
(*b*) Rogers v. Maylor, sit. after Trin. 1790. Park Ins. p. 267.
(*c*) Sit. after Trin. 1795. Park Ins. 267.

Mr. J. *Park* says here: (*a*)—"It has been lamented that this case has not been reported in the Term Reports, it being presumed that an accurate statement of the evidence would have clearly shown that the decision of the learned Judge at *Nisi Prius*, and afterwards of the Court of King's Bench, was correctly right; that justice was done; and that *under the particular circumstances of the case it might have been a very proper exception to the rule as laid down by Lord Chief Justice *Lee*. And then the learned author goes on to show that, in his opinion, the case of *De Garron* v. *Galbraith* is not reconcileable with *Rogers* v. *Maylor;* nor with that candour and fairness which ought to preside in the litigation of all commercial questions. (*b*)

[*484]

"For the omission in the Term Reports I am not answerable; but, as I was counsel in the cause of *De Garron* v. *Galbraith*, I can vouch for the accuracy of the statement; and, being a case decided by the Court on motion, I confess it seems to me entitled to as much consideration as a case decided by a single Judge, however eminent that Judge may have been. Indeed, I do not see any great difficulty in reconciling the doctrine contained in the latter with that of *Rogers* v. *Maylor* and *Christian* v. *Combe*. They all agree that the effect of the adjustment is to throw the *onus probandi* upon the underwriter; and if, immediately after signing, doubts arise about the honesty of the transaction, and those doubts are instantly communicated, the assured ought not, with a knowledge of this, and that the same witness who proves the adjustment and can also prove the communication of the doubts, to proceed to trial upon the adjustment only, as he did in *De Garron* v. *Galbraith;* for then he has had the notice which the learned author alluded to thinks ought to be given, that the fairness of the transaction would be disputed. The only objection I ever made to the case of *Hogg* v. *Gouldney* is, that Lord Chief Justice *Lee* lays down the rule too generally, being stated without any exception, whereas the rule does admit of exceptions. But nobody ever presumed to find fault with that decision, where it probably was not necessary to state the exceptions. But still the comparison without an exception might mislead; for a promissory note, the signature being proved, only shifts the burden of proof of fraud on the defendant. I, therefore, still think the *rule respecting adjustments is to be better collected from the modern cases. And, in addition to the cases heretofore decided upon the subject, I have now to bring forward the opinion of Lord *Ellenborough*, who has, as I conceive, in two very modern cases confirmed the notion entertained by Lord *Kenyon* and the Court of King's Bench in his time. In *Hibbert* v. *Champion*, (*c*) the ship *Ganges* had sailed from the *Downs*, under convoy of the *Fury* sloop of war, on the 12th *December*, 1805, for *Portsmouth*, and before her arrival there, was captured by a *French* privateer. The defence was, that a letter from the captain, dated 5th *December*, stating that he was to sail with the *Fury*, though received on the 6th *December*, had not been communicated to the underwriter before effecting the policy, which was not done till the 12th, the broker having said only that the ship had sailed about three weeks. To this it was said, that the defendant, after reading the letter in question, together with several others written subsequently, had on the 12th *March*, 1806, adjusted the policy, on which adjustment the plaintiff relied, and compared it to the case of an actual payment. But

[*485]

Lord *Ellenborough* said—"If the money has been actually paid, it cannot be recovered back, without proof of fraud; (*d*) but a promise to pay will not, in general, be binding, unless founded on a previous liability. What is an

(*a*) 1 Park Ins. 268.
(*b*) Marshall, 3rd edit. 645.
(*c*) 1 Camp. 134.
(*d*) See Bilby v. Lumby, 2 East, 469.

adjustment? It is an admission, on the supposition of the truth of certain facts stated, that the assured are entitled to recover on the policy. Perhaps, if properly stamped, it might be declared on as a promissory instrument. Here it is a mere admission, and there was no consideration for the promise it is supposed to prove. An underwriter must make a strong case, after admitting his liability: but until he has paid the money, he is at liberty to avail himself of any defence, which the facts ar the law of the case will furnish." It is quite evident, that his Lordship here considered an adjustment as shifting the burthen of proof from the assured to the underwriter: but *by no means shutting out the latter from any ground of defence, which either [*486] the law or the facts would supply. In the particular case the jury thought the letter relied upon, would have made no difference; but it was submitted to their consideration by Lord *Ellenborough:* and the plaintiff had a verdict. (*a*)

The other case was that of *Sheppard* v. *Chewter*, (*b*) where the plaintiff in an action on a policy, from *Liverpool* to *Provence*, with or without letters of marque, had given in evidence an adjustment on the policy signed by the defendant, and proved that, previously to its being signed, an account had been posted up at *Lloyd's* which the defendant must have seen, stating that the ship on her way out had chased everything that she saw, and had at last been captured in the *Gut of Gibraltar*, through the cowardice and mismanagement of the master. The defendant, when he signed the adjustment, said, it was not likely the ship should have been lost by cowardice, when the captain was killed in the engagement. On the part of the defendant it was proved, that the ship, from the time of her sailing from *Liverpool*, had been in the constant habit of cruizing for prizes: and, therefore, it was said to be a deviation. On the other side it was contended, that as no fraud was practised upon the defendant, when he signed the adjustment, and as the notice had informed him of the supposed deviation, it was to be considered as conclusive against him. But

Lord *Ellenborough* said, the adjustment was *primâ facie*, evidence against the defendant: but it certainly did not bind him, unless there was a full disclosure of the circumstances of the case; unless they were all blazoned to him as they really existed. (*c*) Therefore if the jury should think that the defendant, by reading the notice stuck up at *Lloyd's*, had his attention drawn only to the manner in which the ship was captured, and was not roused to the previous deviation with *which he afterwards became acquainted, his lia- [*487] bility to the assured would be discharged, notwithstanding the adjustment. His remark, when he signed the adjustment, seems to show, that he had then only considered the conduct of the master at the moment of the capture: and the expression of the ship having chased everything, did not of necessity imply a deviation, since from carrying a letter of marque she might be considered as at liberty to chase, so that she continued in the line of the voyage."

An adjustment and payment shall not prevent a mistake being set right, if there be a mistake in fact. But where there is a full knowledge of the circumstances, and the assured claim and receive a premium due upon the arrival of a ship (which he has no right to do, till the risk is ended, and the settlement of the whole made) he cannot, without an express stipulation, resort again to the underwriter in any after contingency of the adventure. And, therefore, it has been held in *May* v. *Christie*, (*d*) that where a ship having been seized by the Dutch government was liberated, upon a bond being given by the agent of the assured, and upon its arrival at the place of destination, the policy was adjusted,

---

(*a*) And see Gammon v. Beverly, 8 Taunt. 119.
(*b*) 1 Camp. 274.
(*c*) Reyner v. Hall, 4 Taunt. 725.
(*d*) 1 Holt, 67.

and the assured claimed and received the premium due upon the arrival of the ship, but the vessel and cargo were afterwards condemned; the loss occasioned by the bond being put in force could not be made a charge upon the underwriter.

The indorsement of the adjustment on the policy with the name of the underwriter struck out does not prove the payment of the sum so adjusted. In a case at *Guildhall*, 1829, when the policy was produced, it appeared that an adjustment of thirty per cent., was indorsed upon it, with the name of the defendant, run through with a pen. It was contended for the defendant, with the adjustment, and the name run through was proof of payment. But Lord *Tenterden* said, "that the evidence was not sufficient to prove the payment; that he had often known it to happen that the name *was then struck off a policy, on the faith of an adjustment, where nothing was paid, but an arrangement made to pay at a future time." Other evidence was then given of the payment, and the defendant had a verdict. (*a*)

[*488]

3. One rule relative to adjustments remains still to be mentioned, which is, that if an insurer pay money for a total loss, and in fact it be so at the time of adjustment; if it afterwards turn out to be only an average loss, he shall not recover back the money so paid to the insured. But substantial justice is done by putting him in the place of the insured, and giving him all the advantages that may arise from the salvage.

This rule was settled by the King's Bench in the year 1766, in *Da Costa* v. *Firth*. (*b*) It was an action on the case for 200*l.* upon an *indebitatus assumpsit*, for so much money had and received to the use of the plaintiff. *Non assumpsit* was pleaded, and issue joined. It was brought by the insurer against the insured, to recover back what he had paid him. At the trial a case was reserved for the opinion of the Court. The facts were; that a policy had been underwritten by the plaintiff, for the insurance of any of the packet boats that should sail from *Lisbon* to *Falmouth*, or such other port in *England* as his Majesty should direct, for one whole year, commencing the 1st of *October*, 1763, and to continue to the 1st of *October*, 1764, inclusive, upon any kinds of goods and merchandises whatsoever: and it was agreed that the goods and merchandises should be valued at the sum insured on such packet boat, without farther proof of interest than the policy, and to make no return of premium for want of interest, being on bullion or goods.

The case then states, that the defendant had an interest in bullion on board the *Hanover* packet, being one of the King's packets between *Lisbon* and *Falmouth;* that on the 2nd of *December*, 1763, it was totally lost off *Falmouth*, in a voyage between *Lisbon* and *Falmouth;* and the loss was adjusted *in writing under the policy, in the words following:— "Adjusted a loss on this policy at 100*l.* per cent., the *Hanover* packet, Captain Sherborn, being totally lost at *Falmouth*. Should any salvage hereafter be recovered, the insured promises to refund to the insurer whatever he may so recover, in such proportion as the sum insured bears to the whole interest. *London*, 23rd *October*, 1764, for Richard Seward, Michael Firth."

[*489]

The insurer paid the whole money insured, which was 200*l.* In *April*, 1765, the iron trunk, which contained all the bullion, was fished up; and thereby all the bullion was recovered without prejudice, and delivered to the defendant. The defendant's expense of salvage amounted to 63*l.* 8*s.* 2*d.*, and deducting that sum for salvage, the net proportion of his share came to 206*l.* 11*s.* 9*d.* The plaintiff's proportion thereof, in respect of his subscription, amounted to 48*l.* 4*s.*, which was paid into Court.

The question was, whether the plaintiff was entitled to recover?

(*a*) Adams v. Sanders, M. & M. 373. (*b*) 4 Burr. 1966.

The Court held, that this was a policy of a peculiar sort; and that it was good within the exception of the 19 Geo. 2, c. 37, which says, that certain policies of a particular form shall be void, except on effects from any port in *Europe* or *America*, in the possession of the crowns of *Spain* or *Portugal*. This is a mixed policy: partly a valued policy, partly an open one: it is a valued policy, and fairly so, without fraud or misrepresentation. Therefore the loss having happened, the insured is entitled to recover as for a total loss. The insurer agreed to the value, and cannot be allowed to dispute it. The insured has received the money for a total loss; and there is no want of conscience in retaining it. The cases cited at the Bar only tend to show, that where it appears, before adjustment to be but an average loss, the underwriter shall pay no more than the real damage; the reason of which decision is, that the insured must show the whole case as it then stood. But in the present case, there was a total loss at the time of the adjustment. The adjustment in this case *makes an end of the question. Here is a solemn abandonment, and a solemn agreement, "that the insurers shall be content [*490] with salvage, in such proportion as the sum insured bears to the whole interest." There was a total loss at the time of the adjustment (which is the same as if the damages had then been recovered in an action.) Here is no sort of fraud, nor anything that is against any law: and to refund more than in that proportion would be contrary to the underwriter's own agreement. Therefore the net proportion only, in respect to the plaintiff's subscription after deduction of salvage, ought to be returned, and that is paid into Court. The *postea* was ordered to be delivered to the defendant.

But where a compromise has been entered into by the underwriters, they cannot, at a future period, make a claim for restitution. And, therefore, in the case of *Blaauwpot* v. *Da Costa*, (*a*) it was held, that where satisfaction had been made under a commission for distribution of prizes to the assured, such of the underwriters as had paid were entitled to restitution, but that the *Royal Exchange Company*, with whom the ship had been insured for 1,500*l.*, and who had compounded for their loss and renounced salvage, were not entitled.

And in a very recent case of *Brooks* v. *M'Donnell*, (*b*) in the equity side of the Court of Exchequer, where an insurance was effected on goods on board a ship consigned to *Buenos Ayres*, and the ship, with the cargo, was captured by the *Brazilian* government, and condemned for an attempted breach of blockade: and a notice was given of the capture by the assured to the underwriters, and an offer made to abandon; but the underwriters declined the offer to abandon, and after some negotiations, it was arranged, that by payment by the underwriters of 35*l.* per cent. on the sum insured, the policy should be delivered up to be cancelled: and some years afterwards, in pursuance of a convention, between *Great Britain* and the *Brazilian* government, [*491] *the goods were ordered by the latter government to be restored to the owners, and compensation made: and a claim was made by the underwriters to the whole or part of the sum awarded for compensation, it was held, that the underwriters having declined the offer to abandon, the payment of the 35*l.* per cent. was a compromise of their liability under the policy, and that they were not entitled to any portion of the sum awarded for compensation.

(*a*) 1 Eden, 130.
(*b*) 1 Young & Coll. 500; and see Tunno v. Edwards, 12 East, 488.

SECTION XVI.

GENERAL AVERAGE.

Having in the preceding section considered the two descriptions of losses which happen to the assured by the perils of the sea, and which are borne by the underwriters according to the contract of which we are treating, and recollecting that the first description of loss, which was a total loss of the thing insured, either absolute in the first instance, and without any interference on the part of the assured, or a constructive total loss in which the thing insured remained in specie, or in the case of capture, in which, after a ship had been taken, the assured were by law entitled at once to abandon to the underwriter; and the second description which we considered, were what are properly called average losses, (because they are equally distributed among the different underwriters, each paying his proportion of his subscription) and they differ essentially from total losses, because there may be many average losses in the voyage, and many average losses as well as one total loss; but there cannot be more than one total loss, for when that occurs, the adventure is at an end.

The memorandum which has just been the subject of our inquiries, is intimately connected with the second kind of loss, viz: the average loss; for we [*492] have just seen that by its *terms the underwriter exempts himself from any liability to average loss in articles of a certain description, particularly specified in the memorandum: with regard to others, also specified, he exempts himself, unless the average loss amounts to three or five per cent., with this general condition overriding the memorandum, "unless the average be general, or unless the ship be stranded." The latter part of this condition has been treated of in the preceding section: it now becomes our object to inquire what a "general average" is, and what laws and rules, founded upon law, and the practice, custom, and usage of merchants, for enforcing the benefits and advantages for which it was in the earliest times founded, and its principles regulated and established.

The late Lord *Tenterden*, in his *Treatise on Shipping*, which is so justly celebrated, thus commences his chapter upon this important subject. I shall not hesitate a moment in availing myself of that learned writer and Judge's remarks on that commencement, on the term "general average." He says. "Having thus treated of the respective duties of the owner and merchant, I now proceed to the consideration of a subject which is equally a duty of the one and the other, namely, the general contribution that is to be made by all parties toward a loss sustained by some for the benefit of all. This contribution is sometimes called by the name of 'general average,' to distinguish it from special or particular average, a very incorrect expression, used to denote every kind of partial loss or damage happening either to the ship or cargo from any cause whatever; (*a*) and sometimes by the name of 'gross average,' to distinguish it from customary average, mentioned in the bill of lading, which latter species is sometimes also called 'petty average.' The principle of this general contribution is known to be derived from the ancient law of *Rhodes*, being [*493] adopted into the *Digest of Justinian*, *with an express recognition of its true origin. The wisdom and equity of the rule will do honor to the memory of the state from whose code it has been derived, as long

(*a*) If the learned author applies the term "incorrect expression" to its use in marine insurance treatises or actions of policies of insurance, I cannot acquiesce in his remark; for, it is the word used in the policy where the word *partial* never appears.

as maritime commerce shall endure. The principle of the rule has been adopted by all commercial nations, but there is no principle of maritime law that has been followed by more variations in practice. The modern ordinances of the several continental states of *Europe* differ from each other in many particulars relating to this general contribution, and the *French* ordinance establishes a different mode of contribution in different cases. An enumeration of these varieties would furnish little entertainment or instruction to an English reader; discordant rules rather serve to perplex the choice than to guide the judgment. The determination of *English* Courts of Justice, furnish less of authority on this subject than on any other branch of maritime law, there being few reported cases of questions either between the parties liable to contribution in the first instance, or between a party so liable and an assurer, from whom indemnity has been sought. The work of *Magens* contains a variety of cases of adjustment of average by consuls and Courts abroad, and by merchants at home, detailed with the tedious forms of the notarial office, but accompanied by some very judicious remarks. Much useful information upon this subject is to be found in Mr. *Park's System of Marine Insurances*, and also in the publication by Serjeant *Marshall*, on the same subject." I shall of course myself, in detailing the law on this subject, have occasion to follow not only the guides which this learned author pointed out, but in a great measure to derive the matter which it is my business to give as fully and correctly as I am able, from the treatise of the learned author himself.

The first case which appears to have been argued in our Courts of Justice, on the subject of general contribution, is the case of *Wilson and another* v. *Smith*, (*a*) tried before *Lord *Mansfield*, at *Guildhall*, on 15th *February*, 1764: and afterwards argued in the same year, B. R., [*494] 4 Geo. 3, Trinity Term. And I may add, that having mentioned the guides on this subject, we may expect to derive the greatest assistance from that learned Judge, whose words in many instances, I have had the advantage of copying into this Treatise, on the principles of the law of marine insurance.

It was an action on a policy of insurance, brought for the recovery of 56*l.* 19*s.* 8*d.* per cent., being the damage received by the cargo of wheat on board the *Boscawen* insured at and from *Lancaster* to *Rotterdam*. The policy was in the ordinary form. And the assurers were to be free from average under 3*l.* per cent., unless general, or the ship shall be stranded. The policy was thus underwritten:—"N. B. corn and fish are warranted free from average, unless general, or the ship be stranded. Sugar, tobacco, flax, hides, and skins, are warranted free from average under 5*l.* per cent.; and other goods free from average under 3*l.* per cent., unless general, or the ship be stranded." On her voyage to *Rotterdam* the vessel met with a violent storm, and was by and through the force of the winds and stormy weather, obliged to cut away and leave her cable and anchor for the safety of the ship and cargo, and was also greatly damaged, and obliged to run to the first port (*Liverpool*) to refit, and that the expense of refitting amounted to 38*l.* 15*s.* per cent. The hatches were not opened at *Liverpool*, but she sailed and reached *Rotterdam* and there landed her cargo. That upon unloading the wheat, it appeared that it had received damage from the storm to the amount of 56*l.* 19*s.* 8*d.* per cent. The single question was, (upon the true construction and meaning of the words "free from average unless general, or the ship be stranded,") whether the plaintiffs can, under the circumstances of this case, recover in this action for the damage of 56*l.* 19*s.* 8*d.* per cent. (the other matter not being disputed.) There were two arguments at the Bar, the first by *Dunning* for the plaintiffs,

(*a*) Reported in 3 Burr. p. 1550, and Black. Rep. p. 507.

and *Morton* for the underwriters. They quoted no common law cases on either side. Mr. *Dunning's* argument tended in general to shew that these words amounted to a condition, which condition would render it free from average, unless in two events, viz :—a general average, or a stranding of the ship: but if either of these two events happen, then to be liable to average.

[*495]

Mr. *Dunning* said, "that this clause now in question was first introduced about the year 1749, before which time, he said, assurers were liable to every injury that happened to the goods insured. This clause or memorandum was introduced to deliver the assurers from small averages, and was thought to have been a better method of attaining that end, than adapting the premium to the nature of the commodity, as it might happen to be more or less liable to perish or suffer; which method would have made the policy too complicated; and which the *Dutch* had first tried, and afterwards altered." He argued that there was here a general average, which consisted in a part being destroyed for the sake of saving the whole. Mr. *Morton* argued that the meaning and intention of the policy, that the assurers should not be answerable for any average loss or damage to the goods insured. A general average, he said, was a general contribution of the owners of the goods on board (where part is destroyed to preserve the whole) in proportion to their concern. If another man's goods had been thrown overboard to save the whole cargo, the owners of the wheat must then have been liable to general average in proportion to the value of their wheat. If the ship had been stranded, the assured might have abandoned. Upon a general average, the assurer stands in the place of the owner of the goods: and upon a total loss is entitled to what may be saved. A general average is a contribution by non-sufferers, towards the loss of those who have suffered for the preservation of the whole. But there is nothing in the present case that can render the assurers liable to an average of this wheat insured by them.

On the second argument Sir *Fletcher Norton*, (A. G.) for the plaintiffs, and Serjeant *Burland* for the defendant.

Sir *Fletcher Norton* mentioned a case before Lord C. J. *Ryder*, *1754, between *Cantillon* and *The London Assurance Company*, upon an insurance on corn, with such a clause as this; and the ship being stranded, the plaintiff recovered an average loss of about 80*l.* per cent. For Lord C. J. *Ryder* and a special jury looked upon this as a condition: and that by the ship's being stranded, the assured was let in to claim his whole average loss. After which determination, that company (he said) had altered that clause in their insurances, by omitting the words "or the ship be stranded." (*a*)

[*496]

Serjeant *Burland* argued, that the insurer was to pay no average, unless in the case of a general calamity. It is a general discharge from all average, except in the two cases particularly specified, (which two cases are quite distinct and unconnected.)

The general contribution and particular average have no connection with each other.

The case was ordered to stand over for the opinion of the Court: and on the 10th *July* 1764, Lord *Mansfield* delivered that opinion to this effect:—

"Policies of assurance, according to their present form are very irregular and confused: an ambiguity arises in them from their using words in different senses, particularly in the use of this word 'average.' (*b*) It is used to signify

(*a*) In later times they have since restored it.

(*b*) There has been a great deal of nonsense talked in the books about the confused form of the policy, and the difficulty of understanding the term "average."

a contribution to a general (*c*) loss: and it is also used to signify a particular partial loss.

Sir *Henry Spelman*, in his *Glossary*, under the word "avergium," says,— "It is detrimentum quod vehendis mercibus accidit: ut fluxio vini frumenti corruptio, mercium in tempestatibus ejectio: quibus adduntur vecturæ sumptus, et necessariæ aliæ impensæ. De averagiis quo mercium e navibus projectarum, distribuendis, vetus habetur statutum, non impressum cujus exemplar apud me extat." (Lord *Mansfield* observed that he had never met with that statute.)

*The word "unless," means the same as "except," and is not to be construed as a condition in the sense that the counsel for the plaintiffs would have it. [*497]

The words "free from average unless general," can never mean to leave the assurers liable to any particular average. It is clear that the plaintiffs ought not to recover, and the judgment ought to be for the defendant."

Magens (*a*) says, "that whatever the master, with the advice of his officers and sailors, deliberately resolves to do for the preservation of the whole, in cutting away masts or cables, or in throwing goods overboard in order to lighten the ship, which is meant by the term jettison, is in all places permitted to be brought into a general or gross average; in which all who are concerned in the ship, freight, and cargo, are to bear an equal, or proportional part of the loss which was so incurred for the common welfare; and it must be made good by the assurers in such proportions as they have underwritten."

In the works of writers upon commercial affairs, we very often meet with the word "contribution," also signifying the thing thus described; and in a marine sense "average" and "contribution" are synonymous terms. (*b*)

In treating of the subject, I shall follow the usual division of it into three heads, viz:—

I. The cases in which a general contribution is to be made.

II. The articles which are to contribute.

III. The mode in which the contribution is to be made.

I. The rule of the *Rhodian* laws is this:—"If goods are thrown overboard, in order to lighten a ship, the loss incurred for the sake of all shall be made good by the contribution of all. (*c*) And it was resolved in *Mouse's case*, (*d*) in an action brought for a casket, by *Mouse*, and a hundred *and thirteen pounds taken and carried away. The case was that the [*498] ferryman of *Gravesend* took forty-seven passengers into his barge, and *Mouse* was one of them; and the barge being on the water, a great tempest arose, and a strong wind, so that the barge and all the passengers were in danger of being drowned, if a hogshead of wine and other ponderous things had not been thrown out for the safeguard of the lives of the men. It was resolved, *per totam Curiam*, that, in case of necessity, for the saving of the lives of the passengers, it was lawful for the defendant, being a passenger, to cast the casket of the plaintiff out of the barge, with the other things in it; for "*quod quis ob tutelam corporis sui fecerit sine id fecisse videtur*," to which the defendant pleads all this special matter; and the plaintiff replies, "*de injuriâ suâ propriâ absque tali causâ.*" And this issue was tried: and it was proved directly that, if the things had not been cast out of the barge, the passengers had been drowned; and that, "*levandi causâ*," they were ejected, some by one passen-

---

(*c*) But never without the word "general" applied to it.

(*a*) 55. (*b*) Beawes.

(*c*) Dig. 2, 1. Lege Rhodia cavetur, ut si levandæ navis gratia jactus mercium factus sit, omnium contributione sarciatur, quod pro omnibus datum est.

(*d*) 12 Co. 63; mentioned also in Bird v. Astock, 2 Bulst. 280.

ger, some by another. And upon this the plaintiff was nonsuited. It was also resolved that, although the ferryman surcharge the barge, yet for safety of the lives of passengers in such a time and accident of necessity, it is lawful for a passenger to cast the things out of the barge: and the owners shall have their remedy upon the surcharge of the ferryman, for the fault was with him in the surcharge. But if no surcharge were, but the danger accrued only by the act of God, as by tempest, no default being in the ferryman, every one ought to bear his loss for the safeguard and life of a man; for "*interest rei publicæ quod homines conserventur*," 8 Ed. 4, 23, &c.; 12 H. 8, 15; 28 H. 8; Dyer, 36. So if a tempest arise in the sea. "*levandi navis*," and for the salvation of the lives of men it may be lawful for passengers to cast over the merchandises, &c.

Beawes is of opinion that, in order to make the act of throwing the goods overboard legal, three things must concur:—

[*499] 1st, What is so condemned to destruction be in *consequence of a deliberate and voluntary consultation held between the master and men.

2ndly, That the ship be in distress, and that sacrificing a part be necessary in order to preserve the rest.

3rdly, That the saving of the ship and cargo be actually owing to the means used with that sole view.

Mr. J. *Park* observes, "that the second point of these three propositions is alone necessary," (*a*) and therefore, in a case of *Butler* v. *Wildman*, (*b*) where goods were thrown overboard to prevent them falling into the hands of the enemy, this, though jettison, in the general meaning of the term, was held not to be the subject of a general average.

Previous deliberation, if there be time to deliberate, and a due choice of the heaviest and most cumbersome articles, may be proof of the necessity and propriety of the act. But they are not the only, and ought not to be considered as the essential proofs. So decided in the case of *Birkley and others* v. *Presgrave*. (*c*) Indeed, in such a case, as in many others, too close a compliance with form at a period of supposed danger, has very justly excited a suspicion of fraud. (*d*)

It appears, also, by the laws of *Wisbuy*, (*e*) that in an emergency of such a nature as to justify lightening the ship, it was necessary to consult, first, the owners of the goods, or supercargo; but, if they would not consent, the merchandise might, notwithstanding their refusal, be ejected, if it appeared necessary to the rest of the people on board: a regulation evidently founded in necessity, to prevent the sordid individual from obstructing a measure so essential to the general safety. (*f*)

If the ship ride out the storm, and arrive in safety at the port of destination, the captain must make regular protests, and must swear—in which oath some

[*500] of the crew must join—that *the goods were thrown overboard for no other cause but for the safety of the ship. (*a*)

In all countries, however, and in all cases, it is justly required of the master that he draw up an account of the jettison, and verify the same by the oath of himself or some of his crew, as soon as possible after his arrival at any port,

---

(*a*) Park Ins. 279.
(*b*) 3 B. & A. 398.
(*c*) 1 East, 220. See also this case for instances of what comes under the "head" of "general average."
(*d*) See Abbott on Ship. 6th edit. 427; 1 Emerigon, tom. 1, p. 605; Consolato del Mare, c. 47, 48, 49.
(*e*) Art. 20.
(*f*) Laws of Oleron, art. 8.
(*a*) Beawes, 148; Molloy, b. 2, c. 6, s. 2.

that there may be no opportunity to purloin goods, and then pretend they were cast over in the hour of danger. (*b*)

It is evident, that from one of the rules above stated, that there can be no contribution without the ejection of some and the saving of others; but it is not always necessary for the purposes of contribution that the ship should arrive at the port of its destination. If the jettison does not save the ship, but she perish in the storm, there shall be no contribution of such goods as happen to be saved, because the object for which the goods were thrown over was not attained. But if the ship be once preserved by such means, and continuing her course should afterwards be lost, the property saved from the second accident shall contribute to the loss sustained by those whose goods were thrown out upon the former occasion. (*c*)

Magens, in one place, expresses his opinion contrary to the rules contained in the above ordinances; (*d*) in the next paragraph he admits that the goods saved ought to contribute. (*e*)

From the rule established by the *Rhodians*, various corollaries have been deduced. Thus, if in the act of jettison, or in order to accomplish it, or in consequence of it, other goods in the ship are broken, damaged, or destroyed, the value of these must be included in the general contribution; and damage done to the ship, by cutting holes to effect jettison, or to let out the water. (*f*)

*So if to avoid an impending danger, or to repair the damage occasioned by a storm, (*a*) the ship be compelled to take refuge in [*501] a port to which it was not destined, and into which it cannot enter without taking out a part of the cargo, and the part taken out to lighten the vessel on this occasion happen to be lost in the barges employed to convey them ashore; this loss being also occasioned by the removal of the goods for the general benefit, must be repaid by a general contribution; but, if after the removal of the goods for such a purpose, the ship, with the remaining part of the cargo, should unfortunately perish, and the goods in the barges be saved, the proprietors of the latter shall not contribute to the loss of the others, because the saving thereby is not owing to that loss. So if, upon the expectation of an hostile attack, part of the cargo be taken out and sent away and saved, and the ship, with the remainder of the cargo, fall into the hands of the enemy, the part saved shall not contribute to make good the loss. (*b*)

Mr. J. *Lawrence*, in *Birkley* v. *Presgrave*, (*c*) says, "All loss which arises in consequence of extraordinary sacrifices or expenses incurred for the preservation of the ship and cargo, come within the description of general average."

The damage sustained in defending a ship from an enemy or pirate, such as the expense of curing and attending upon officers or mariners wounded, does not come under the head of general average, although some writers upon this subject maintain the contrary. (*d*) But *Emerigon* (*e*) and others maintain the contrary; and Mr. J. *Park* says, though in former editions of his work, on the authority of the above-mentioned writers, he had stated that such came

---

(*b*) Abbott on Ship. 428; Stevens on Average, 29.

(*c*) Ord. Louis XIV. tit. Contribution, art. 15, 16; Ord. Hamb. 2 Mag. 240; Ord. Rotterdam, 2 Mag. 98.

(*d*) 1 Mag. 56. (*e*) 1 Mag. 57. See Park Ins. 281.

(*f*) Beawes, 148; Stevens, 12.

(*a*) In the Dig. 2, 4, and the Guidon, c. 5, art. 28. See Beawes, 165; 2 Valin, 167 Abbott on Ship. p. 428, 6th edit.

(*b*) Sheppard v. Wright, 1 Show. P. C. 18.

(*c*) 1 East, p. 228.

(*d*) 1 Mag. 64; Valin, liv. 3, tit. 7; Le Guidon, ch. 5, art. 4.

(*e*) Ch. 12, p. 41, and note 8.

under the head of general average, (*f*) in his last edition he says, "that it is
[*502] quite clear that in point of practice these expenses have *never been placed to the account of a general average: and since the time when the earlier editions were published, the subject underwent considerable discussion in the case of *Taylor* v. *Curtis*, (*a*) in the Court of Common Pleas, where all the authorities quoted on either side were referred to by the Judges; and after time taken to deliberate, their unanimous judgment was pronounced by Lord Chief Justice *Gibbs*, that neither the expense of repairing a ship, injured by successfully resisting and beating off a privateer, thus reaching her desired port in safety, nor of curing the wounds of the sailors sustained in the action, nor the ammunition expended in the engagement, was the subject of general average."

Lord Chief Justice *Gibbs*.—"The doctrine of general average has its origin in the *Rhodian* law *de jactu* '*omnium contributione sarciatur, quod pro omnibus datum est.*' The different states of *Europe* have made different regulations on this subject, all of them professing to follow the *Rhodian* law, but often differing from each other; and the foreign jurists have made very different comments on that law. In this country, there are no local regulations on this subject; we should, therefore, as in all doubtful cases, resort to the judgments of our municipal Courts, if this point had ever arisen there. There is nothing in any of the foreign jurists which we think ought to govern us on these points, unless they had been supported by admitted principles, decided authorities, or general usage. None of the decided cases apply to the present; and we have unfortunately been so long engaged in war, that instances of this kind must frequently have occurred: and as there appears to be no case where a demand
[*503] like the present has been made, we must *conclude from that silence that no general usage, which could justify such a demand, has existed, and, therefore, that such losses cannot be taken to fall within the principle of general average."

And it was decided in *Harris* v. *Watson*, (*a*) by Lord *Kenyon*, that an extraordinary allowance promised by the master to the sailors, in consideration of unusual exertions made by them in a case of danger, cannot be made the subject of a general average, since the mariners are bound, without any extra wages, to use all exertions that are necessary in a time of danger.

Another charge usually claimed as general average was, according to *Beawes*, the sum which the master may have promised to pay for the ransom of his ship to any privateer or pirate, when taken. (*b*) But, as we have seen in a former part of this work, ransoms are now prohibited by the law of *England*. (*c*)

A master who has cut his mast, parted with his cable, or abandoned any other part of the ship and cargo, in a storm, in order to save the ship, is well entitled to this compensation: but if he should lose them by the storm, the loss falls only upon the ship and freight, because the tempest only was the occasion of this loss, without the deliberation of the master and crew, and was not voluntarily done with a view to save the ship and lading. (*d*)

(*f*) Park Ins. 281.

(*a*) 2 Marsh. 309. The expense of curing the wounded is made the subject of a general average by the Code de Commerce, art. 440, num. 6, and by the ordinances of the Hanse Towns, art. 35. For the provisions of our laws for the encouragement and protection of seamen, see Abb. 6th edit. p. 2, c. 6.

(*a*) Peake, 72.

(*b*) Beawes, 148.

(*c*) *Ante*, p. 300.

(*d*) Beawes, 148. The loss of a cable cut away by the master in a storm as the ship was entering Sunderland harbour, in order to fasten the ship to the pier and prevent collision with another vessel, was held the subject of a general average. Birkley v. Presgrave, 1 East, 220.

But in the case of *Covington* v. *Roberts*, (*e*) where a vessel carrying a press of sail, in order to avoid a privateer, sustained damage, the Court held that it did not come under the head of a general average. It was only a common sea risk, and must be borne by the owner of the ship, who, if insured, can claim the loss from the underwriter.

*So where a ship slips or cuts away her cable in order to sail with convoy, this is not the subject of general average. (*a*) [*504]

And if a cannon ball pass through a bale of goods, the damage done is not the subject of a general average. (*b*)

We have seen in a former part of this Treatise, (*c*) that goods lashed on deck do not come under the general term of goods in the policy, unless it is the usual mode of stowing them, for that the risk upon them is of course greater than on other goods, and therefore in the case of a loss, though these goods must contribute in common with the others, (*d*) they themselves (if lost) are not the subject of a general average.

By the ordinance of Louis XIV., art. 12, s. 16, it provided that no master shall lay any goods on the ship's deck without the consent of the owners, on pain of being answerable for all damages; and by art. 13, s. 33, that no contribution shall be demanded for payment of such goods as shall be laden on deck. The *Code de Commerce*, art. 421; *Emerigon*, c. 12, s. 42; *Consol. del Mare*, c. 183; and *Valin*, tit. "*Du Capitaine*," art. 12, are authorities to the same effect. But *Valin* says that this rule does not apply to boats or small vessels going from port to port, or to cases in which that mode of stowage is sanctioned by custom.

In *De Costa* v. *Edmunds*, (*e*) we have seen that it was decided that, where the jury found that there was a usage to carry goods of that description on deck, the underwriters were held liable for the loss. And the Court of Common Pleas, in a recent case of *Gould* v. *Oliver*, (*f*) which was an action brought against a shipowner to recover a contribution in respect of a cargo of timber, laden on deck, and where it was proved that it was the usage of the trade so to stow it, held, that the same rule was to be adopted in the case between the shipowner and the owner of the cargo, as between *the owner of the cargo and the underwriter in *De Costa* v. *Edmunds*, and that [*505] as the stowage on deck was sanctioned by usage, the loss was properly the subject of general average.

This subject was most elaborately argued and discussed at the Bar in the Court of Queen's Bench, and an important judgment of that Court delivered by Lord *Denman*, C. J., on *April* 28th, Easter Term, 5 Vict. 1842, in the case of *Milward and others* v. *Hibbert and another*. (*a*)

The first count of the declaration stated, that heretofore, to wit, 20th *November*, 1837, by deed poll, or policy of assurance, there made and sealed, &c. The declaration then set out the policy, which recited, that the plaintiffs had represented to defendants, directors of, and acting for, *The Indemnity and Mutual Marine Assurance Company*, that they were interested in, or authorized as owners or agents to make the assurance, and had covenanted, &c., to pay the premium mentioned: and it was witnessed that in consideration. &c., defendants covenanted and agreed with the plaintiffs, that the capital stock and funds of the Company should be subject, and liable, and be applied to pay and

---

(*e*) 2 N. R. 378.
(*b*) Le Guid. c. 5, art. 4; 1 Emerigon, 627, c. 12.
(*c*) Page 19.
(*d*) Stevens, 14.
(*e*) 4 Camp. 142.
(*f*) 5 Scott, 445; 4 B. N. C. 134; *ante*, p. 20.
(*a*) 4 Q. B. 120.
(*a*) Stevens on Average, p. 16.

make good all such losses and damages thereinafter expressed, as might happen to the subject-matter of the said policy, and might attach to the said policy, in respect of the sum of 3,600*l.*, thereby assured. Which assurance was declared to be upon hull and stores, valued at 10,000*l.*, machinery valued at 10,000*l.*, in all 20,000*l.* average, payable at such valuation, of the ship or vessel called *The Kilkenny Steamer*, whereof, &c., was then master, lost or not lost, "at and from" the 28th day of *November*, 1837, at noon, in port and at sea, at all times, on all occasions and services, until the 28th day of *November*, in the year of our Lord, 1838, at noon, with liberty to tow and be towed; that the assurance aforesaid, should commence upon the said ship "at and from" as aforesaid, and until she had moored at anchor, &c., and that it should be [*506] lawful for the said ship or vessel to proceed and *sail to and touch, and stay, &c., without prejudice to that assurance. And touching the adventures, perils, which the capital stock and goods of the said Company were made liable to, they were, &c., (in the usual form.) Those were the exceptions, as to corn, fish, &c., unless general, or the ship be stranded. Averment, that plaintiffs were interested, &c.: that the ship, after making of the policy and during the continuation of the risk, to wit, 13th *February*, 1838, "departed and set sail on a certain voyage from *Waterford* to *London*, and that after the commencement of the said voyage, and during the continuation of the risk, &c., and whilst said plaintiffs were so interested as aforesaid, &c., divers wares, goods, and merchandises, to wit, one thousand pigs of great value, to wit, of the value of 2,000*l.*, were shipped and loaded at *Waterford* aforesaid, in and on board the said ship or vessel, to be carried, &c., on freight from *Waterford*, aforesaid to *London*, aforesaid?" that the said ship, whilst she was proceeding, &c., with the said pigs on board, and during the continuance of the risk, and whilst the plaintiffs were so interested, &c., to wit, on the day and year last aforesaid, by the perils and dangers of the sea, &c., became and was leaky, and greatly strained, broken, &c.; insomuch, that by means thereof, it then and there became expedient and necessary for the preservation of the said ship and cargo, and for the benefit of all concerned to lighten the said ship, and cast and throw part of her cargo overboard: and the master then and there did for this purpose aforesaid, cast overboard the said pigs, &c., and leave them; whereby they were lost: by reason whereof the plaintiffs, in respect of their interest in the hull and stores and machinery of the said ship, then became liable to bear, and did actually pay a proportionable part of the value of the said pigs so lost as aforesaid, and thereby sustained a general average of 1,000*l.* upon the hull and stores and machinery of the said vessel so assured and valued as aforesaid: and, in consequence thereof, the said defendants became liable to pay to the said plaintiffs 450*l.*, being the said [*507] defendants' proportion of the general average *loss, for and in respect of the said sum of 3,400*l.* by them assured as aforesaid. Of all which premises, &c., (notice to the defendants.) "By reason whereof, an action," &c.

Plea 2nd to the first count. That the said pigs, therein alleged to have been so cast and thrown overboard, before and up to the time of their having been so cast and thrown overboard, had been and were laden and placed in and upon the deck of the said vessel, by reason whereof the defendants were not, nor are liable to pay or contribute to any general average loss sustained by the said jettison of the said pigs: verification. Replication. "That at the said time, when the said pigs were laden and placed in and upon the deck of the said vessel of the plaintiffs, as in the second plea alleged, the said vessel of the plaintiffs was proceeding on and prosecuting a certain voyage from *Waterford* to *London*." "That before and at the time of loading and placing the said pigs in and upon the deck of the said vessel of the plaintiffs, there had been,

and was and still is, a certain known and approved custom of trade touching and concerning the loading of pigs in and on board of vessels trading between *Waterford* and *London*, and employed in carrying pigs from *Waterford* to *London* aforesaid; that is to say that the owners of such vessels have had, and have been used and accustomed to have, and of right ought to have had, and still of right ought to have, for themselves and their servants, the liberty and privilege of loading and placing in and upon the deck of such vessels a reasonable number of such pigs as they, from time to time respectively, are employed to bring from *Waterford* to *London*." That the said pigs, in the first count of the declaration, and in the second plea mentioned, were before, and up to the time of their being so cast and thrown overboard as aforesaid, laden and placed in and upon the deck of the said vessel of the plaintiff, in pursuance and according to the said custom and usage of trade. Verification. Demurrer, assigning for cause that it is not stated in the replication that the said defendants had any notice of the said custom therein stated and set forth, or that the said defendants had any *notice that the said vessel would be employed in carrying [*508] pigs, as in that replication mentioned. Joinder in demurrer. This demurrer was argued on *November* 9th, 1841, before Lord *Denman*, C. J., *Williams*, *Coleridge*, and *Wightman*, Justices. It was ably argued by *Cresswell* (now Mr. J. *Cresswell*) for the defendant, and by the late Sir *W. W. Follett* (*S. G.*) for the plaintiff. The Court, after the argument, took time to consider. And Lord *Denman*, C. J., on the 21st *January*, 1842, delivered the judgment of the Court. After stating the substance of the declaration and second plea, his Lordship proceeded as follows:—

"A replication was pleaded and demurred to, but the plaintiff excepted to the plea; and we must see whether it makes out a good defence in law. The plea assumes that in no case whatever can the shipowner recover from the underwriter the value of goods laden on deck. The authority cited for this doctrine is a passage at page 428 of Serjeant *Shee's* recent edition (*a*) of Lord *Tenterden's* Treatise on Shipping,—'The *Consolato del Mare*, and the *French* Ordinance, exclude from the benefit of general average goods stowed upon the deck of the ship; and *Valin*, in his Commentary upon the latter, (*b*) gives two reasons for the exception.' He adds,—'In the first place they ought not to be there, and can only be, because the vessel is full without them, or because the master has neglected to stow them elsewhere; in either of which cases he and his owners are responsible to the shippers, unless placed there by his consent. Secondly, because there is every reason to presume that, being in the way, they will be thrown overboard before the necessity of jettison has occurred, on account of the obstruction they create. But he tells us that this rule does not apply to boats or other small vessels going from port to port, or to trades in which that mode of stowage is sanctioned by custom. The same rule prevails in *England* and *America;* the exceptions to it were recognized by Lord *Ellenborough*, *in a case between the owner of goods and the under- [*509] writers; and more recently the reasoning of *Valin* has been adopted in the Court of Common Pleas, in an action against the owner of a ship to recover contribution for a loss by jettison of goods stowed on deck.' (*a*) The corresponding paragraph in the text of the fifth edition of Lord *Tenterden's* Treatise on Shipping, page 355, (the last published during his life) runs thus: 'The *French* Ordinance, in express terms, excludes from the benefit of gen-

(*a*) 6th edit.

(*b*) The Commentary on Liv. 3, tit. 8, s. 13, contains the passage referred to.

(*a*) Gould v. Oliver, 5 Scott, 445; 4 B. N. C. 134; and see the case fully referred to in a subsequent action between the same parties, *ante*, p. 20, of this Treatise.

eral average goods stowed on deck, and the same rule prevails *in practice* (*b*) in this country. Goods so stowed may, in many cases, obstruct the management of the vessel; and, except in cases where usage may have sanctioned the practice, the master ought not to stow them there without the consent of the merchant. Upon this passage we may remark, that it contains no statement of the exception as a part of the general law of merchant or the law of *England*. It is said to prevail *in practice* in this country; the note adding, 'so proved in the causes of *Myer and others* v. *Vander Deyl*, *Guildhall* Sittings, before Lord *Ellenborough*, 1803, and of *Backhouse* v. *Ripley*, before *Chambre*, J., a short time before.' No particulars of these cases being preserved, we cannot know in what manner the question was brought on. In *Ross* v. *Thwaites*, reported at page 23 of *Park* on Insurance, (*c*) and tried before Lord *Mansfield* at *Guildhall*, 'an action was brought upon a policy of insurance of the captain's goods for six months certain. The loss proved was chiefly of goods lashed on deck, and the captain's clothes, and the ship's provisions. It was proved by an underwriter and a broker, that none of these things are [*510] within a general policy on goods, for the risk was greater *as to goods lashed on deck than other goods: and a policy on goods means only such goods as are merchantable and a part of the cargo. They also swore that when goods like the present are meant to be insured, they are always insured by name, and the premium is greater. Lord *Mansfield* said, 'he thought it was consistent with reason, and understood the usage to be so; therefore he advised the plaintiff to withdraw a juror, the premium having been paid into Court, to which he consented." When Serjeant *Marshall* copied this report into his Treatise, (735) he appends this note, "See, however, *De Costa* v. *Edmunds*, (*a*) where it was contended for the underwriters that they were not liable for goods stowed on the deck, for which were cited *Ross* v. *Thwaites*, (*b*) and *Backhouse* v. *Ripley*. (*c*) But Lord *Ellenborough* left it to the jury to say whether it was usual to carry vitriol on the deck, and whether these cargoes were properly stowed. If there was a usage to carry vitriol on deck, the underwriters were bound to take notice of it without any communication, and all they could require was, that the cargoes should be stowed in the usual manner.' Verdict for the plaintiff. Rule for a new trial refused. (*d*) It is very singular that Lord *Tenterden* does not cite this case, for he expressly lays down the principle on which it was determined. But, before we arrive at the exception to the rule which is here introduced, we must observe upon the nature of the rule itself. In the first place, it is the creation of a positive regulation in the foreign law alluded to, for reasons which may possibly furnish an adequate motive for such enactment. 'Goods so stowed,' Lord *Tenterden* remarks, 'in many cases may obstruct the management of the vessel;' a reason which is by no means universal, for in many cases it may be that particular goods will be best and most safely stowed on deck. But the most important expression of this accurate and careful writer is that which describes the rule [*511] as prevailing in practice in *this country. For the practice appears to have been not to lay it down as a rule of law that, for goods stowed on deck, the owner of them shall be excluded from the benefit of general average, but to receive the evidence of commercial men respecting the usage of

---

(*b*) In Mr. Serjeant Shee's last edit. (7th) he says, in a note, that in submission to what was said by the Court of Queen's Bench, in the case of Milward v. Hibbert, he has altered the text in his 7th edition, and restored the "words of the author," viz: the words "in practice."

(*c*) Page 23, 8th edit.

(*b*) Park Ins. 23.

(*d*) De Costa v. Edmunds, 2 Chitt. 227.

(*a*) 4 Camp. 142.

(*c*) Abbott on Shipp. 6th edit. 429.

the trade and the general understanding of those engaged in it, and in insuring which may obviously vary, and require from time to time fresh evidence and different explanations. Again, the reasons which may have produced the foreign enactment, and are cited by *Valin*, are by no means adopted by Lord *Tenterden*. He mentions, indeed, only one of them—the danger of obstructing the management of the vessel—but in extremely qualified terms, "goods so stowed may in many cases obstruct the management of the vessel;" a sufficient ground for refusing contribution under particular circumstances, but none for a sweeping forfeiture of all right to recover in respect of goods so disposed. Lastly, the rule laid down by Lord *Tenterden* includes two exceptions, where usage may have sanctioned the practice, and where the master has the owner's consent to stow them there. The usage would affect the question whoever were the parties: the owner's consent only when it happened to arise between him and the master. Plainly, then, the authority of Lord *Tenterden* does not warrant the large statement respecting the *English* law which his last learned editor promulgates. Indeed, this paragraph bears the mark pointed out in the preface as distinguishing his additions to the original work, though it incorporates some parts of that corresponding with it. We may further observe that the two reasons quoted from *Valin* are not of general application. He says, 'that goods' ought not to be stowed on deck, and can only be, because the vessel is full without them, or because the master has neglected to stow them elsewhere, in either of which cases he and his owners are responsible to the shipper, unless the goods were placed there with his consent. Secondly, because there is every reason to presume that, being in the way, they will be thrown overboard before the necessity of jettison has occurred, on *account of the obstruction they create." Now it is obvious that there may [*512] be other and valid reasons for stowing goods on deck; indeed, some goods could be stowed in no other place, such as timber, and on some voyages live animals, and they may, certainly, be there stowed with proper skill and care, so as not to be in the way of the crew in their operations. These matters of fact may vary with every different trade, or even with every single adventure. The danger of a crew being tempted to throw overboard goods on deck, before the ship is in danger is quite insufficient; that danger must depend upon their weight and bulk, the manner of stowage, and many other particulars; but the argument would prove too much, for it would apply to whatever goods may be nearest at hand, and consequently likely to be the soonest sacrificed. When we say that the reasoning of *Valin* was adopted by the Court of Common Pleas (in the late case of *Gould* v. *Oliver*, (*a*)) we must confine ourselves to his reasoning in favour of the owner of goods stowed on deck, according to the custom of a particular trade, in accordance with Lord *Ellenborough's* decision in *De Costa* v. *Edmunds*. (*b*) The Lord Chief Justice, without laying down the rule or the mode of proving it, but assuming it to prevail in practice, and only deciding that the owner may, notwithstanding, recover contribution from the shipowner where the goods were stowed on deck according to the usage of the trade for a loss by jettison. We have, then, this exception forming part of the rule: and we have seen that *Valin* introduces another, for which there is no other obvious reason, that of boats or other vessels going from port to port; a description of the size and destination of vessels which may be somewhat difficult of application.

But although this rule of excluding goods stowed on deck from contribution to general average is not founded on any universal principle, it certainly prevails in practice to a great extent. Serjeant *Shee* truly says, "that the law is

(*a*) 5 Scott, 445; 4 N. C. 134. (*b*) 4 Camp. 142.

[*513] the same *on this subject in *England* and *America;*" and Judge *Story*, in his valuable edition of *Abbott on Shipping*, (*a*) proves this proposition by two decisions. The books in which these are reported are not at hand; but we have already shown that the law of *England* has stopped very short of the doctrine, that no owner of goods stowed on deck shall, under any circumstance, be allowed to recover contribution on general average. The question between the merchant and the shipowner may be different from that between either of them and the underwriters, because the former may agree to stow the goods in such a manner that the latter will not be at all responsible for their loss.

But it seems to the Court, for the reasons assigned, that the mere fact of stowing them on deck will not relieve the underwriters from responsibility, inasmuch as they may be placed there according to the usage of the trade, and so as not to impede the navigation, or in any way increase the risk.

And it is accordingly the practice in whaling voyages, to adjust, on the principles of general average, the loss of oil thrown overboard from the deck, where it is carried a short time after it is put into casks, before it can be properly and safely stowed in the hold. (*b*)

The boats of a ship ought to be lashed on deck, if, however, they are properly lashed to the quarters it is customary to consider the loss a general average. (*c*)

There are two instances in which it has been the subject of much doubt and discussion, whether the loss in those cases are to be considered as the subject of a general average or not. These are where the master voluntarily runs his ship on shore, either to avoid being captured by the enemy, or to prevent her foundering at sea, or driving on the rocks. By the foreign ordinances, and according to foreign writers, when the running the ship on shore is the volun-

[*514] tary deliberate act of the master, for the benefit of all concerned, it is *to be considered as general average. (*a*) And the *Consolato del Mare*, (*b*) and *Roccus*, (*c*) say that, if to avoid a total loss the captain and crew should think it proper to run the ship on shore, the damage thereby occasioned, whether to ship or cargo will be a gross average. And *Weskett* and *Magens* seem to have been favourable to the same conclusion. (*d*)

The learned *Pothier*, after enumerating other species of averages, says, "besides these species of average there is another, viz: where a ship being chased by an enemy, the master, in order to prevent her capture, runs her ashore, the damage caused is a general average, whether it happen to the ship or cargo, the running on shore having been made for the general safety." (*e*) On this subject there are no express decisions of our Courts of Justice, though we can hardly see in what respects running a ship on shore to prevent its falling into the hands of the enemy, can be distinguished from the case of carrying an unusual press of sail for the same purpose, the damage consequent upon which we have seen has been decided to be not the proper subject of a general average. (*f*)

With respect to the other instance there does not appear to be any real distinction betwixt the master voluntarily and by deliberation running his ship on

---

(*a*) Page 355, ed. Boston, 1829. (*b*) Phillips on Ins. vol. 1, p. 333.
(*c*) Blackett v. Royal Exch. 2 Cr. & J. 244; 2 Tyr. 266.
(*a*) Vid. Ord. France Leg. Rhod. 3, 5, 1; Ord. Konigsb. (1), c. viii. art. 7; Ord. Copenh. art. "Av." 1, 5; Laws of Wisbuy, art. 55; Molloy, b. 2, c. 6, s. 15; Beawes, 165; Welwood, tit. 20.
(*b*) Consol. del Mare, c. 192, 193. (*c*) Roccus de Nav. Not. lx. n. 164.
(*d*) 2 Magens, 332; Weskett, 252. (*e*) Poth. Contr. de Lou. p. 11.
(*f*) Covington v. Roberts, 2 N. R. 378; Poth. C. & L. p. ii. s. 2, n. 150.

shore, in order to avoid her sinking, or going upon the rocks, for the sake of the whole concern, and the case where he deliberately cuts away part of the ship, or throws part of the cargo overboard, in order to save the rest. In both cases a certain damage to the ship or cargo is deliberately incurred for the sake of preserving the whole. The learned author of the *Treatise on Average*, to which I have so frequently referred, gives his *opinion that these [*515] cases cannot properly be considered as cases of general average, but come under the head of those losses, which are inevitable, and ought to be borne by the parties themselves, separately, though he admits that the practice is the other way. (*a*)

It is said, that if a ship be taken by force, carried into some port, and the crew remain on board to take care of and reclaim her, not only the charges of reclaiming shall be brought into a general average, but the wages and expenses of the ship's company during her arrest, from the time of her capture, and being disturbed in her voyage. (*b*) In this idea *Magens* concurs, and asserts, that such expenses are allowed as average in *London* as well as elsewhere. He denies, however, and, as it seems, justly denies, that an allowance would be made under general average, for sailors' wages and victuals, when they are under a necessity of performing quarantine, in which case the master would have been obliged to maintain and pay them, though his vessel had arrived only in ballast. But at the same time he admits, that charges occurring by an extraordinary quarantine shall be brought into a general average. (*c*)

It has however been a considerable question, whether the extraordinary wages and victuals expended during the detention by a foreign prince not at war ought to be brought into a general average, so as to charge the underwriter? *Magens* and *Beawes* differ upon the point, the latter being of opinion that it should, the former that it should not. In *England* there is no adjudged case, nor any regulation upon the subject. We may remember that Lord *Mansfield*, in *Goss* v. *Withers*, 2 Burr., p. 696, says, "that by the general law the assured may abandon in the case of merely an arrest on an embargo [*516] *by a prince not an enemy: and therefore one would suppose extraordinary wages and victuals would not come under the head of a general contribution, for the owner has the right to abandon if he likes, or at any rate the underwriters on ship would be liable to the assured.

Mr. *Park* (*a*) says, that Lord *Mansfield* seems to have been of that opinion in an action upon a policy of insurance on a "ship." It was brought to recover the amount of wages and provisions expended during the time the ship went from *Bengal* to *Bombay* to repair. His Lordship, as he has frequently done since upon similar occasions, decided against the action, being an insurance on the ship only, and the item in question being sailors' wages. But his Lordship said, there may be cases where exceptions to the general rule should be allowed; but in order to consider a case as excepted, it must be an expense absolutely necessary, and such as could not be avoided, owing to some of the perils stated in the policy.

It has been stated in a preceding part of this Treatise, that extra wages and provisions cannot be recovered from the underwriters on "ship" merely. *Fletcher* v. *Poole*, Park Ins., 115, and other cases, were cited, and this was

---

(*a*) Stevens, 29; and see Abb. on Shipp. 6th edit. 433, where the editor refers to the law and authorities in America on the subject, from which it would appear that when the damage arises from a "deliberate sacrifice for the general benefit," it has been considered that such a loss from running a ship on shore is to be considered as a general average.

(*b*) Beawes, 150. (*c*) 1 Mag. 67.

(*a*) Park Ins p. 287. In the case of Lateward v. Curling, Guildhall, Sit. after Trin. 1776.

lately settled in the case of *De Vaux* v. *Salvador*, 4 A & E. p. 425. It seems to be admitted, that where there is any damage sustained by the ship which is the subject of a general contribution, the wages and other expenses, during the time of repair, follow as accessaries, and form part of the general contribution.

By the ordinances of *Louis* the Fourteenth, the charges in such a case shall be reputed general average, if the seamen be hired by the month; otherwise, if by the voyage. (*d*)

There is a passage in *Beawes* which confirms the idea entertained by Lord *Mansfield*. "Though it must be noted," says this author, "that the charges of unloading a ship, to get her into a river or port, ought not to be brought [*517] into a *general average; but they may when occasioned by an indispensable necessity to prevent the loss of ship and cargo. As when a ship is forced by a storm to enter a port to repair the damage she has suffered, if she cannot continue her voyage without an apparent risk of being lost, in which case the wages and victuals of the crew are brought into an average from the day it was resolved to seek a port to refit the vessel, to the day of her departure from it, with all the charges of unloading, reloading, anchorage, pilotage, and every other expense incurred by this necessity." (*a*)

A question nearly similar came before the Court of King's Bench in the case of *Da Costa* v. *Newnham*, (*b*) in which Mr. Justice *Buller* quoted the above passage from *Beawes*, as also the above-mentioned case of *Lateward* v. *Curling:* and although the learned Judge thought it then unnecessary to decide the point here agitated, yet the leaning of his mind seemed to be in favour of the affirmative. This, however, was held by the whole Court,—that where a ship is obliged to go into port for the benefit of the whole concern, the charges of unloading and reloading the cargo, and taking care of it, and the wages and provisions of the workmen hired for the repairs, become general average.

Where a ship went into port in distress, and wanting repairs, it became necessary to take out the cargo, and there being no warehouses at hand, it was put on board other vessels, Lord *Stowell* held, that as the unloading of the goods was for the common benefit of all, it being necessary to unload the ship for the preservation of the cargo, as well as for its own repairs, the expense incurred by it must be considered as a general average. (*c*)

In *Da Costa* v. *Newnham*, the custom of *Lloyd's* of deducting one-third new for old materials after a ship's first voyage, was recognized. (*d*) And whether a ship is to be considered on her first voyage, may be ascertained by [*518] the *general understanding of merchants as well as by the testimony of underwriters. (*a*) And when the evidence is contradictory, the terms of the charter-party and policy may be taken into consideration. (*b*)

And in the case of *Plummer* v. *Wildman*, (*c*) where a ship in the course of her voyage was run foul of by another, and the captain is obliged to cut away the rigging, and to return to port to repair the damage and cutting away, without which it was found the vessel could not have prosecuted her voyage, nor kept the sea with safety: the Court held, that the expenses of repairs, so far as they were absolutely and unavoidably necessary for the general safety of the whole concern, but no further, and the unloading for the purpose of repairs were a general average. But the captain's expenses during the unloading,

---

(*d*) Tit. Average, art. 7.
(*b*) 2 T. R. 407.
(*d*) See Poingdestre v. Royal Exchange Comp. R. & M. 378.
(*a*) Pirie v. Steele, 2 M. & R. 49.
(*b*) Per Lord Tenterden, in Fenwick v. Robinson, 1 Danson & Lloyd, 8.
(*c*) 3 M. & S. 482.
(*a*) Beawes, 150.
(*c*) The Copenhagen, 1 Rob. A. R. 298.

repair, and reloading, the shipowner must bear: and crimpage for replacing deserted seamen is not general average.

Lord *Ellenborough* said, "If the return to port was necessary for the general safety of the whole concern, the expenses unavoidably incurred by such necessity might be considered as a general average. It is not so much a question whether the first cause of the damage was owing to this or that accident, to the violence of the elements, or to the collision of another ship, as whether the effect produced was such as to incapacitate the ship, without endangering the whole concern, from further prosecuting her voyage, unless she returned to port and removed the impediment. As far as removing the incapacity is concerned, all are equally benefited by it, and, therefore, it seems reasonable that all should contribute to the expenses of it, but if any benefit *ultrâ* the mere removal of this incapacity should have accrued to the ship by the repairs done, inasmuch as that will redound to the particular benefit of the shipowner only, it will not come under the head of general average; but that it will be a matter of calculation *upon the adjustment. The amount of the expenses of repairs, to be placed to the account of general contribution, must [*519] be strictly confined to the necessity of the case, to enabling the ship with her cargo to prosecute the voyage. As to the charge for the captain's expenses during the unloading, repairing, and reloading, the shipowner must bear the captain's expenses in port, and crimpage must be disallowed, it does not come under general average."

But this point came afterwards into discussion in a case of *Power* v. *Whitmore*, (*a*) in the King's Bench, where that Court held, in opposition to the passage in *Beawes*, and to the inclination of Mr. Justice *Buller's* opinion in *Da Costa* v. *Newnham*, that the wages and provisions of the crew, while the ship remained in port, whither she was compelled to go for the safety of the ship and cargo, in order to repair a damage occasioned by tempest, were not the subject of general average. They also held that the expenses of the repairs themselves were not general average; nor were the wages and provisions of the crew during her detention in port to which she had returned, and was detained there on account of adverse winds and tempests; nor was the damage occasioned to the ship and tackle by standing out to sea with a press of sail in tempestuous weather, in order to avoid an impending peril of being driven on shore and stranded. (*b*)

Lord *Ellenborough* said, "general average must lay its foundation in a sacrifice of a part for the sake of the rest, but here was no sacrifice of any part by the master, but only of his time and patience, and the damage incurred was by the violence of the wind and weather, this is not like the case recently before the Court, (*c*) where the master was obliged to cut away his rigging in order to preserve the ship, and afterwards put into port to repair that which he sacrificed." And it was decided in the case of *Price* v. *Noble*, (*d*) that the owners of a ship's cargo were liable to a contribution for *ship's stores necessarily, and by the advice of the mate thrown overboard, after [*520] she was captured, and while in the possession of the enemy: for the capture, without condemnation, did not divest the property of the owners while a *spes recuperandi* remained.

The general principle of law deducible from these decisions appears therefore, to be, that if a vessel is compelled to put into port, to repair a damage, which is itself the subject of a general average, all the necessary expenses of

(*a*) 4 M. & S. 141.
(*b*) See Covington v. Roberts, *ante*, p. 503.
(*c*) Plummer v. Wildman, *ante*, p. 518. (*d*) 4 Taunt. 123.

port charges, wages, and provisions, and the expense of unloading and reloading the said ship, and the necessary outlay in putting the ship in a condition to enable her to pursue her voyage, are properly the subjects of a general contribution. But where a vessel merely puts into a port from stress of weather, though this may be an act of prudence on the part of the captain, and for the benefit of all, yet, inasmuch as it does not result from any sacrifice on the part of the owners for the benefit of the whole concern, the expenses attendant upon this step are not properly the subject of a general contribution, but must be borne by the shipowners themselves.

It is laid down by writers practically acquainted with the subject, that the loss of exchange on bills drawn by the captain on his owners, for the ship's disbursements, in putting into a port in distress; maritime interest on bottomry bonds, obliged to be given under similar circumstances, interest on advances and the like charges, are the subjects of general average, but it is submitted that, strictly speaking, these charges must follow as incidents to the nature of the loss, and that if it be not itself of the character of a general average, these respective charges consequent thereupon will not partake of it either. (*a*)

If a vessel be disabled by the perils of the sea, from carrying her cargo to its place of destination, the master may hire another vessel, or borrow money on the security of his ship or cargo. But if he be unable to raise money on bottomry, *or by hypothecation of the cargo, and no other vessel can be obtained, Lord *Stowell* determined that the master might sell a portion of the cargo, to enable him, by repairing his vessel to carry the remainder to its place of destination, and that the money so obtained might make the subject of a general average. (*b*)

[*521]

But in the case of *Dobson and others* v. *Wilson*, (*c*) where a ship, having met with tempestuous weather in her voyage from *Hull* to *St. Petersburg*, was obliged to put into *Copenhagen* to unload and repair; the expenses of which repairs, as well as the Sound dues, were paid by the owner's agent at *Copenhagen:* and the ship being ready to proceed on her voyage, the *English* expedition against *Copenhagen* coming in sight she was seized by the *Danish* government, and the captain and crew made prisoners of war. In consequence of the hostilities, it being impossible to negotiate bills on *England*, for the purpose of repaying the agent the sums he had advanced for the use of the ship, the agent caused the captain to be arrested, by process by the maritime Court of Justice at *Copenhagen*. In this situation the captain, for his liberation from imprisonment, and that he might be able to prosecute his voyage, sold a portion of the cargo belonging to the plaintiffs who brought an action against another shipper for contribution. Lord *Ellenborough* said, "that had the ship been seized for the non-payment of the Sound dues, I should have thought that a sale of a part of the cargo to pay them, in the absence of all other means to raise money for that purpose might have been the claim for a general average. But these dues had been paid by the ship's agent, and the money so paid merely constituted a private debt due to him. I do not think that any part of the plaintiffs' goods was sacrificed for the safety of the ship, and the residue of the cargo, in such a manner as to give them a right to a contribution from the other shippers of goods on *board. Their proper remedy is against the owner of the ship."

[*522]

II. Secondly, let us now consider what articles are to contribute to make good these losses, and in what proportion.

(*a*) See Stevens, 27.

(*b*) The Gratitudine, 3 Rob. Ad. Rep. 255, and see Wilson v. Millar and others, 2 Stark. 1.

(*c*) 3 Camp. 480.

By the ancient laws of *Rhodes*, *Oleron*, and *Wisbuy*, the ship, and all the remaining goods, shall contribute to the loss sustained. (*a*) The most valuable goods, though their weight should have been incapable of putting the ship in the least hazard, as diamonds or precious stones, must be valued at their just price in this contribution, because they could not have been saved to the owners but by the ejection of the other goods. Neither the persons of those in the ship, nor the ship's provisions, nor respondentia bonds, suffer any estimation; nor does wearing apparel in chests and boxes, nor do such jewels as belong to the person merely: but if the jewels are a part of the cargo, they must contribute.

Those who carry jewels by sea ought to communicate that circumstance to the master; because the care of them will be increased in proportion to their worth, to prevent their being thrown overboard promiscuously with other things: and hence their preservation will be a common benefit. (*b*)

2. Both by law and custom, the wages of sailors are not to contribute to the general loss; a provision intended to make this description of men more easily consent to a jettison, as they do not then risk their all, being still assured that their wages will be paid. (*c*)

3. The way of fixing a right sum, by which the average ought to be computed, can only be by examining what the whole ship, freight, and cargo, if no jettison had been made, would have produced net, if they had all belonged to one person, and been sold for ready money. And this is the sum whereon the contribution should be made, all the particular goods bearing their net proportion. (*d*)

*4. In no respect whatever do the ordinances of foreign states differ so much, as in the manner of settling the contribution of the ship and freight. In some places, the ship contributes for the whole of her value and freight; in others, for the half of her value, and one-third of her freight: and again, in others, both ship and freight are to contribute for one-half. (*a*) By the laws of *Koningsberg*, *Hamburg*, and *Copenhagen*, the ship is to contribute for the whole of her value and freight. (*b*) They also declare, that the value of the ship shall be that which she was worth when she arrived; and that from the freight a deduction shall be made of the men's wages, pilotage, and such other charges, as come under the name of petty average, of which it is customary everywhere, for the cargo to bear two-thirds, and the ship one. (*c*) [*523]

It was held in *Da Costa* v. *Newnham*, (*d*) that freight must contribute to the general average. And the whole of the freight payable on the voyage is to be brought into the contribution, for that was in hazard at the time the sacrifice was made, which reduced the general average. And therefore, in the case of *Williams* v. *London Assurance Company*, (*e*) where a ship was chartered from *London* to the *East Indies*, there to deliver her outward cargo, and to

---

(*a*) De leg. Rhod. s. 2, art. 8; Oler. art. 8; Wisb. art. 20; Molloy, l. 2, c. 6, s. 4.
(*b*) 1 Mag. 63.
(*c*) 1 Mag. 71.
(*d*) 1 Mag. 69.
(*a*) Ord. of Genoa and France.
(*b*) 2 Mag. 207, 237, 339.

(*c*) See Stevens on Aver. 51, 55, where he says, "That mode of calculation appears to be the best which approximates the nearest to the value of the ship when she sailed, after deducting the provisions and the stores expended, the wear and tear of the voyage, and any average loss by sea damage incurred up to the time when the general average loss took place."

(*d*) 2 T. R. 407. Freight contributes according to its full amount, a deduction of seamen's wages and other expenses of the voyage being first made. Abb. 447. But see Stevens, p. 60, where that learned writer seems to consider that the provisions expended ought to be deducted from the original value of the ship, and not from the freight.

(*e*) 1 M. & S. 318. And see 6 Rob. Ad. Rep. 90; 1 Edw. Ad. Rep. 223. Cox v. May, 4 M. & S. 151.

return from thence with a cargo for *England*, into the river *Thames*, and there make a true delivery, and it was agreed that the *charterers should, upon condition that the ship performed her voyage and arrived in *London*, and not otherwise, pay freight for every ton of goods that should be brought home at so much per ton, and an average loss occurred upon the ship's outward voyage: but afterwards being repaired, completed her adventure, returned back to *London*, and earned freight, in an action brought by the ship-owner on a policy of insurance for the outward voyage, the underwriters were allowed to deduct the amount of a general average on the freight.

[*524]

5. The sea laws of different countries vary no less than upon the former question, in fixing at what prices goods thrown overboard shall be estimated, and for what value those saved are to contribute.

By the ordinances of *Rotterdam*, *Stockholm*, and *Copenhagen*, if the accident which occasioned the general average, happened before half the voyage was performed, the jettison was to be estimated at prime cost; but if after that period, then at the price for which such goods would sell, at the place of discharge, freight, duties, and ordinary charges deducted. (*a*) That distinction is now, however exploded in *England*, and the custom has become general of estimating the goods saved and lost, at the price for which the goods saved were sold, freight and all other charges being first deducted. (*b*) This rule is agreeable to the marine laws of *Wisbuy*, (*c*) which declare, that the goods thrown overboard shall be brought into a gross average, and shall be rated at the same price for which other merchandise of the same sort preserved from the sea or enemy, was sold. This custom mentioned by *Molloy* was certainly new in *England* at the time he wrote: for it appears by *Malyne*, that in 1622, the distinction was observed of estimating the goods at prime cost, if the jettison happened before half the voyage was performed; and if after, at the price the rest of the goods *sold for at the place of discharge. (*a*) However, *Molloy* is a more modern authority; and *Magens* says, that the prevailing mode of settling averages now adopted in *England* is conformable to that rule, which has abolished the distinction. (*b*)

[*525]

Gold, silver, and jewels, at most places, contribute to a general average, according to their full value, and in the same manner as any other species of merchandise. It has been said, that an immemorial custom has prevailed at *Amsterdam*, that gold and silver shall only contribute for half their value: the reason for such a custom, one is at a loss to conjecture. (*c*) In *England* no such custom prevails; but money and jewels must fall into the general average at their full price: and a modern writer assures us, that the practice was such in *London* when he wrote; and such I believe it to be at this day. (*d*)

In a case of *Peters* v. *Millgan*, (*e*) the doctrine here advanced was mentioned and confirmed by Mr. Justice *Buller*, as clear law.

III. The contribution is in general not made till the ship arrive at the place of delivery: but accidents may happen, which may cause a contribution before she reach her destined port. Thus when a vessel has been obliged to make a jettison, or, by the damages suffered soon after sailing, is obliged to return to her port of discharge; the necessary charges of her repairs, and the replacing the goods thrown overboard, may then be settled by a general average. (*f*)

(*a*) 2 Mag. 100, 285, 339. (*b*) Molloy, tit. Avr. s. 15.
(*c*) Leg. Wisb. art. 20.
(*a*) Malyne Lex Merc. 1st part, c. 26. Park Ins. 296.
(*b*) See Richardson v. Nourse, 3 B. & A. 237; Stevens, 45.
(*c*) 1 Mag. 62. (*d*) Molloy, tit. Average, s. 4; 1 Mag. 62.
(*e*) Sit. at Guildhall after Mich. 1787. Park Ins. 296.
(*f*) Roccus de Navibus, Not. 96; 1 Mag. 60.

1. It is clear that in making contribution the value of the goods thrown overboard is to be included in the value of the whole that is to contribute, otherwise the proprietors of those goods will receive the full value without contributing anything *to the loss. The late Lord *Tenterden*, in his Treatise on the Law of "*Merchant Ships and Seamen*," has inserted an [*526] example in figures by which, as he very properly observes, the principle of the mode of contribution can be more easily illustrated. (*a*)

It only remains now to state, that the insurers are liable to pay the insured for all expenses arising from general average, in proportion to the sums they have underwritten. *Roccus* says, "Jactu facto, ob maris tempestatem, pro sublevanda navi, an teneantur assecuratores ad solvendum estimationem rerum jactarum domino ipsarum? Dic eos non teneri, quia pro rebus jactis fit contributio inter omnes merces habentes in illa navi pro solvendo pretio domino ipsarum, et ideo si assecuratus recuperat pretium rerum jactarum, non potest agere contra assecuratores; tamen tenentur assecuratores ad reficiendum illam ratam et portionem, quam solvit assecuratus in illam contributionem faciendo inter omnes, habentes merces in illa navi quæ portio cum non recuperetur ab aliis, habetur pro deperdita, et proinde ad illam portionem tenentur assecuratores." (*b*)

The opinion of this learned civilian is agreeable to the laws of all the trading powers on the continent of *Europe*, as well as to those of *England*, where the insurer, by his contract, engages to indemnify against all losses arising from a general average.

2. With respect to the payments of the contributions to a general average, it is usual in this country for the brokers who have procured the policy of insurance to be effected, to draw up an adjustment of the average which the underwriters usually pay in the first instance without any dispute. But in case of dispute the law provides a remedy for and against each party to the contribution.

In the case of an expenditure of money, probably an action for money paid might be maintained against each of those *who were benefited by such expenditure. But as this would lead to a multiplicity of [*527] actions; and this species of action is not applicable to the case of goods thrown overboard, the better mode in all cases seems to be to apply for contribution to a Court of Equity, where effectual relief may be obtained against all the parties in one suit. (*a*)

In *Birkley* v. *Presgrave*, (*b*) it was decided that a special action of *assumpsit* may be maintained by the owner of a ship against the owner of part of the cargo, to recover from him his proportion of a general average loss, incurred by cutting the cable and part of the tackle of the ship, and applying them to a use, for which they were not originally intended, for the general preservation of the whole concern.

And in the case of *Dobson and others* v. *Wilson*, (*c*) it was held by Lord *Ellenborough* that a similar action might be held by one shipper of goods against another.

3. By the maritime laws and usages of all nations the place of the ship's destination or delivery of her cargo is the place at which the average is to be adjusted, and the master is not compellable to part with the possession of the

---

(*a*) The reader is referred to the note in question, Abb. 6th edit. p. 449.

(*b*) Roccus de Assecurationibus, Not. 62.

(*a*) Com. Dig. tit. Chancery, (2, 1,) and Shower's Parl. Cas. and see the judgment of Lord Ellenborough in Dobson v. Wilson, 3 Camp. 480; see *ante*, p. 505, case of Milward v. Hibbert.

(*b*) 1 East, 220. (*c*) 3 Camp. 480.

goods until the sum contributable in respect to them is either paid or secured to him. (*d*) It would, therefore, seem to follow as a natural consequence that if the average is to be adjusted at the place of destination the adjustment must be made conformably with the law of that place. And it has been decided, therefore, in the case of *Simond and Loder* v. *White*, (*e*) that where the proprietors of goods were compelled at *Petersburg* to pay a sum of money to the shipowner as a contribution to a general average, settled at *Petersburg* according [*528] to the law of *Russia*, *in order to recover possession of their goods, they could not recover back again so much of the money paid as would not have been charged to them on an adjustment of average according to the law of *England*, the ship being a British ship and all the parties British subjects.

SECTION XVII.

THE ASSURERS, ETC.

Having in the fifteenth section of this Treatise considered the effect which the term "unless general" has upon the memorandum, by which the underwriters exempt themselves, in the case of some articles, altogether from the payment of average losses, in others unless the losses amount to five per cent., and in all others not mentioned, and, with respect to the ship and freight, unless amounting to three per cent., with this general exception overriding the whole memorandum, viz: "unless general," or "the ship be stranded;" and having also in the preceding section treated of "general average," as to its real nature and character as a most ancient rule and principle of frequent and most useful application in marine affairs at the present day, I come now to treat the last sentence in the policy itself, which was, we recollect, for certain reasons alleged, postponed till after the memorandum was discussed, though the sentence we are about to refer to is properly the last sentence of importance in the policy immediately followed by the subscription of the underwriters; whilst the memorandum, though affecting the whole policy, scarcely can be called part of it, and might be omitted altogether, without interfering with the contract between the parties, any more than with respect to the limitation of the underwriters' liabilities in cases of average losses, except upon two conditions. This sentence is in the following words:—"And it is agreed by us, the assurers, that this [*529] writing or policy of assurance shall be of as much force and effect as *the surest writing or policy of assurance heretofore made in *Lombard Street*, or in the *Royal Exchange*, or elsewhere in *London*. And so we, the assurers, are contented, and hereby promise and bind ourselves, each one for his own part, our heirs, executors, and goods, to the assureds, their executors, administrators, and assigns, for the true performance of the premises, confessing ourselves paid the consideration due unto us for this assurance by the assured, at and after the rate of (the premium, so much per cent.) In witness whereof we, the assurers, have subscribed our names, and

---

(*d*) 1 Consulat de la Mer, s. 225; Complete Body of Sea Laws, s. 33, art. 31; Wellwood, tit. 21, p. 47; Bynkershoek Questiones Juris Privati, lib. 4, c. 24; Malyne's Lex Mercatoria, 3rd edit. 113; Beawes, 245; Ordinance of Louis XIV. book 3, tit. 8; Du Jet, art. 21; Abb. on Shipp. 6th edit. 451.

(*e*) 2 B. & C. 805.

sums assured, in *London.*" This is necessary, of course, for the protection of the assured, and, as we before observed, the policy is signed only by the underwriters. But it is to be recollected that they, in the policy itself to which their names are affixed, "confess themselves paid the consideration due unto them for this assurance by the assured, at and after the rate of (;") and therefore a court of law, or of equity, will bind them to their bargain. The policy becomes the property of the assured, and he may maintain an action for it against any person wrongfully withholding it, either the broker, or any party into whose hands it may have got; but the broker (as we shall presently see) has a lien on the policy for advances.

Lord *Mansfield*, in a case of *Harding* v. *Carter and another*, (*a*) reported in the late Mr. J. *Park's* Treatise, very early laid the law down in favour of the assured. The action of trover was brought by the plaintiff (a captain of a ship) against the defendants, who were brokers, for two policies of assurance. The defendants wrote to the plaintiff that they had had two policies made, the one on the plaintiff's "clothes and wages," the other on the account of the "owners," and that the underwriter was Mr. Newnham. A loss having happened, the defendants produced a policy, underwritten by one T. S., only insuring the ship, in which the plaintiff had no interest. Lord *Mansfield.*—"I shall consider the *defendants as the actual assurers, and therefore the plaintiff must prove his interest and loss." The defence set up [*530] was, that the letter above stated in evidence was written by the defendant's clerk, by mistake; and it was said that trover could not be maintained for that which never existed; but his Lordship would not suffer the defendants now to contradict their own representation; and the plaintiff accordingly had a verdict to the amount of his interest, the premium being deducted.

In the beginning of this Treatise, I mentioned who might, by law, be the assured. I shall now briefly state who may be the assurers. It seems that at the common law, and by the usage of merchants, any person whatever might be an assurer, however unable he might be from poverty to make up the losses insured, provided the merchant was weak enough to trust to such a security. In process of time, however, there were so many who made a great show of wealth, in order to deceive the honest and unsuspicious trader out of his premium, that it became an object of national and Parliamentary interference. And by the statute 6 Geo. 1, c. 18, the king was empowered to found two chartered companies, viz: "*The Royal Exchange Assurance Company*," and "*London Assurance Company*," for making marine insurances, and for lending money on bottomry; and, by the 12th section of the act, a monopoly was given them, in exclusion of all other corporations or partnerships, all policies made by which were declared to be void, and the parties to them liable to the penalties of usury. Individual persons, however, might underwrite policies or lend on bottomry, if not on account of a corporation or partnership. And, by the 26th section, the "*South Sea Company*," and "*The East India Company*," were also allowed to lend on bottomry, with regard to ships and goods in their service. The privilege, however, thus given to these two companies, in exclusion of all other corporations and partnerships, is now taken away by 5 Geo. 4, c. 114; by the second section, however, of this act it is provided that nothing in that act should affect the rights and privileges *of the two corporations, otherwise than by making it lawful [*531] for other corporations and bodies politic, and persons acting in partnership, to grant and make policies of insurance, and contracts of bottomry Insurances may, therefore, at this day be made by private individuals, and by partnerships

(*a*) Sit. at Guildhall, Easter Vacation, 1781. Park Ins. p. 5.

or companies, with or without charters, without any restriction. The companies who have in recent years come into existence in consequence of this enactment, it may easily be imagined, are extremely numerous both in *England*, *Scotland*, and *Ireland;* it would be useless for me to mention their names, a great number of them, however, will be found to be parties in many of the recent cases referred to by me. I, however. shall just refer to the ancient chartered companies of "*The Royal Exchange Assurance Company*," and that of the "*London Assurance Company.*"

1. The Company of the *London Assurance*, whose policies were nearly the same as those of the *Royal Exchange Company*, have now adopted the following memorandum, more analogous to that of the private assurers, as it re-establishes the exception, which they had discontinued, in the "case of stranding:" (*a*)—"Free from all average on rice, corn, flour, fish, salt, saltpetre, fruit, and seeds, except general, or the ship be stranded;" "free from average on sugar, rum. hides, skins, hemp, flax, and tobacco, under five pounds per cent.; and on all other goods, the freight, and ship, under three pounds per cent., except general, or the ship be stranded."

2. The *Royal Exchange Company*, which is remarkable for the following memorandum, which does not contain the words, "unless the ship be stranded:"—"Free from all average on corn, flour, fish, salt, fruit, seeds, hides, and tobacco, unless general, or otherwise specially agreed.

[*532] "Free from average on sugar, rum, skins, hemp, and flax, *under five per cent.; and on all other goods, and on the ship, under three per cent., unless general."

3. Of the private assurers, it is hardly necessary I should mention the society of underwriters at *Lloyd's*, who assemble together in a large room in the *Royal Exchange*. These underwriters, though quite independent of each other, have rules and regulations which are binding for the most part upon them all; they have a list of every registered *British* ship certainly, with the class to which it belongs; they have agents all over the world; they have daily accounts from all parts of the globe relating to ships, the accidents which have happened to them, accounts respecting their arrival at their ports of destination, of the times of their setting sail on their different voyages, of their being missing and not heard of, and of every thing relating to the ships which are dispersed over the world, which may (by possibility) interest and affect their concerns. They are a highly honourable and wealthy set of persons. There are also underwriters residing in the large sea-port towns in *Great Britain*, such as *Liverpool*, *Bristol*, *Edinburgh*, *Dublin*, and others.

And I must now mention another class of men, viz: the insurance brokers, who, in fact, are the agents who actually make for the merchants, their principals, the insurances with the underwriters. They are, as well as the underwriters, a most respectable class of persons, and extremely useful to merchants living at a distance from *London*. And in this section I propose, first, to consider what are the rights and duties of the insurance broker, and also in what manner the settlement of accounts between them, the underwriters, and the assured, in point of practice, really takes place. And in this section the settlement which I allude to, is that amicable arrangement between the assured and the underwriters, by which the losses are paid after they have been adjusted; in a further part of this Treatise it will, unfortunately, be necessary

(*a*) See *ante*, p. 496, the account given by Sir F. Norton, in his argument, 3 Burr. 1553, of the Company having given up the use of that part of the memorandum relating to the stranding "of the ship" after having been defeated in an action of Cantillon v. the Company.

to point out by what form of legal proceeding either party must adopt, in order to obtain a proper redress for what *they may consider the wrongs and grievances they have received from the other party. [*533]

Policies of insurance are seldom made by the party himself really interested, but generally by the intervention of an agent employed by the assured, called an insurance broker, who transacts the business with the underwriters as attorney for his principal, from whom he receives his instructions, which if he do not obey, and from which if he deviate, he is answerable to his employer in an action like any other person who undertakes any office, employment, trust, or duty, and who thereby impliedly undertakes to perform it with integrity, diligence, and skill, *Delany* v. *Stoddart.* (*a*) Insurance brokers are a class of persons who may be properly enough designated as the goers-between the merchant making insurances and the underwriters who subscribe the policies. As many of the former reside abroad, or in remote parts of *England*, and may be supposed, frequently, not even to be known to the underwriters, the brokers who make the insurances for them in *London*, must be considered as a very useful class of agents, and are, in some respects, invested with a superior degree of authority than agents in general are. They are likewise persons of great respectability and honour, and to whom the merchant is able to look with confidence for a proper performance of his duty, and for the selection of accredited and responsible underwriters to subscribe the policy.

When a merchant abroad consigns goods to another in this country, giving instructions to the consignee to make insurances upon the cargo, the proper and usual plan is for the merchant here to apply to a broker who is personally acquainted with the underwriters, and who gets the insurance made by them, thus dividing the risk amongst a number of responsible persons. It need, therefore, hardly be remarked, that if the merchant at home, instead of proceeding in this manner, were to take the risk upon himself, without the *knowledge and consent of his correspondent, and *debit* him [*534] with the amount of premium, he would be guilty of gross misconduct, and that in the event of a loss, he would not only be liable to the consignor, but that the premium, having been received by him without a consideration, might be recovered back. I would not, however, by the above observations, be construed to insinuate that a practice of this description, illegal and dishonest as it would be, obtains at all in this country, the acknowledged integrity and honour of whose merchants are so well established over the whole world. There would likewise be this obvious objection to the consignee becoming the insurer himself, as having the cargo consigned to him, and consequently the control of it, he has the opportunity, in taking it out of the ship, of making the nature of an average loss appear different from that which it is, in fact, so as to keep it out of the exception of the common memorandum.

The insurance broker is agent both for the assured and for the underwriter. His duty to the assured, besides in pursuing his instructions and exercising due care and diligence in effecting the policy, consists in his receiving from the underwriter the proceeds of a settlement of a loss, and his duty to the underwriter is to pay them, when received, to the assured, *Russel* v. *Bangley.* (*b*) I propose to consider, in the first place, what are the rights and duties of the insurance broker; and, in the second place, I shall consider the general question of the settlement of accounts between the broker, the underwriter, and the assured, in which question will be involved the respective rights and liabilities of the several parties to each other.

I. First, then, we will consider the rights and duties of the insurance broker.

(*a*) 1 T. R. 22. (*b*) 4 B. & A. 398.

1. The insurance broker sometimes acts under a *del credere* commission, and an action lies against the assured for the price without waiting till the event is determined, *Carruthers* v. *Graham.* (*d*)

[*535] *As the broker transacts the chief part of the business, and pays the premium, the law gives him a lien upon the policy in his hands without any notice given to the underwriters, so as to enable him to deduct not only the premium and commission due on the particular policy, but the general balance due to him on the account between him and his principal, *Mann* v. *Forrester.* (*a*) And this is so, although the policy be not made on account of the party giving him the orders, for if he have no notice at the time that the policy is not on account of the party employing him, he has a right to satisfy his general balance out of money received on the policy both before and after notice that it belongs to a third party, for he must be supposed to have made advances on the credit of the policy which was allowed to remain in his hands: per Lord *Ellenborough* in *Mann* v. *Forrester.* (*b*)

And it has been decided, that if a broker parts with the possession of the policy so as to lose his lien upon it, and it gets back again into his hands, for any purpose whatever, the lien revives, *Whitehead* v. *Vaughan.* (*c*)

It has been also held in the case of *Falkner* v. *Case*, (*d*) that such policies whilst pledged with the broker, are not in the order and disposition of the bankrupt assured within the meaning of the Bankrupt Act, although no notice is given to the underwriters.

But in the case of *Maanss* v. *Henderson*, (*e*) when an agent made a policy in his own name, he being an *Englishman*, and told the broker that the property was neutral, and to warrant it as such, it was held that this was a sufficient notification to the broker that the party acted only as agent; and, therefore, in an action against the broker by the foreign principal, it was held that the broker could only set off the money due for the particular premium, and not the general balance due from the *English* agent to him.

[*536] *In *Hunter* v. *Leathley*, (*a*) the broker who made the policy was called as a witness for the plaintiff, and required to produce the policy: this he refused to do, claiming to have a lien on it for the premiums advanced by him. But it appearing that he had been served with a *subpœna duces tecum*, Lord *Tenterden* held that he was bound to produce it, inasmuch as he would not thereby be deprived of his lien. His Lordship said, "if we allowed the broker to withhold the policy on account of his lien, we should permit that which would work great inconvenience, and we should enable brokers to assist the underwriters in defeating the just claims of the assured. We do not by this decision deprive the party of his lien, he still has the policy in his possession, and has the same right of lien as before." And it was held, likewise, that although he had a lien on the policy, he still was a competent witness at the trial between the assured and the underwriter.

2. It has been observed, that an action will lie against a broker for either not attending to the orders of his principal in effecting an insurance when required to do so, or for being guilty of remissness in the execution of it. When a man undertakes either by an implied, or an express promise, to do a thing for another, and he neglects to do it, or does it unskillfully, the law gives the person in general an action for the remedy. And this is the case with respect to

---

(*d*) 11 East, 578.
(*b*) 4 Camp. 60.
(*c*) T. T. 25, Geo. 3, and Parker v. Carter, Trin. Term. 1788, which cases are in Mr. Cooke's Book on Bankruptcy.
(*d*) Cited in Lempriere v. Pasley, 2 T. R. 491.
(*e*) 1 East, 335.
(*a*) 11 Camp. 60.
(*a*) 10 B. & C. 858.

an insurance broker; and the only difference between the action against him and that on the policy against the underwriters, is in point of form; for the plaintiff is in this action entitled to recover from the broker the exact sum he ordered to be insured; and the defendant is entitled to every benefit of which the underwriter could have taken advantage, such as fraud, deviation, non-compliance with warranties, and the like.

In the case of *Smith* v. *Lascelles*, (*a*) the whole law of this action was very fully laid down by Mr. Justice *Buller*, and assented to by the whole Court; and upon this occasion that *learned Judge mentioned the three instances in which such an order to insure must be obeyed, otherwise an action will lie. [*537]

First, where a merchant abroad has effects in the hands of his correspondent here, he has a right to expect that he will obey an order to insure, because he is entitled to call his money out of the other's hands when and in what manner he pleases.

The second class of cases is, where the merchant abroad has no effects in the hands of his correspondent, yet if the course of dealing between them is such, that the one has been used to send orders for insurance, and the other to comply with them, the former has a right to expect that his orders for insurance will still be obeyed, unless the latter give him notice to discontinue that course of dealing.

Thirdly, if the merchant abroad sends bills of lading to his correspondent here, he may engraft on them an order to insure, as the implied condition, upon which the bills of ladings shall be accepted, which the other must obey, if he accept them, for it is one entire transaction. For if the commission from abroad consists of two parts, the one to accept the bill of lading, the other to cause an insurance to be made, the correspondent cannot accept it in part, and reject it as to the rest.

3. But it was held in the case of *Wilkinson* v. *Coverdale*, (*b*) if a person, though not legally obliged to comply with an order to insure, nevertheless accepts it, it is incumbent on him to carry it into execution, and to perform it with diligence and ordinary skill, or he will be liable to the principal for the consequence arising from his unskillfulness or neglect.

Thus in *Wallace* v. *Telfair*, (*c*) where a merchant here accepted an order for insurance, but limited the broker to too small a premium, in consequence of which no insurance could be procured, it was held that he was liable to make good the loss to his correspondent.

*And in *Sellar* v. *Work*, (*d*) where a broker employed another, but omitted to give him all the instructions he was furnished with, [*538] it was held that he was liable to answer for the loss occasioned by his omission, though he derived no profit from the transaction.

But if an agent, to whom insufficient orders are sent, does all that is usual to get the insurance made, that is sufficient; because he is no insurer, and is not obliged to get the insurance made at all events. (*e*)

4. In the case of *Park* v. *Hammond*, (*f*) where a broker was informed that the assured would take upon himself the risk of the cargo from *Malaga* to *Gibraltar*, and was ordered to insure from *Gibraltar* to *London*, and neglected to state to the underwriters that the goods were not laden at *Gibraltar*, inasmuch as this omission vacated the policy, he was held liable to the assured for this neglect.

(*a*) 2 T. R. 187.
(*b*) 1 Esp. 75.
(*c*) 2 T. R. 188, n.
(*d*) At Nisi Prius, 1801, Marsh. 305.
(*e*) Smith v. Cologan, 2 T. R. 188, n.
(*f*) 2 Marsh. 189.

And in the case of *Mallony* v. *Barber*, (*d*) where an insurance broker was instructed to make a policy at and from *Teneriffe* to *London*, and he omitted to insert in it a liberty to touch and stay "at all or any of the *Canary Islands*," he was held liable for that negligence, because it was proved that that liberty was invariably inserted in such policies.

And in *Campbell* v. *Rickards and others*, (*e*) if the broker, when he makes a policy, omits to state any circumstance, which, on the trial between the assured and the underwriter, would constitute a sufficient answer for the latter, on the ground of there having been a material concealment, he is liable in an action to the assured for this omission. And, therefore, where a merchant at *Sydney* shipped goods for *England* on board a ship, and, by another ship that sailed after her, wrote to an agent in *England*, and desired him, if he received

[*539] that letter before the ship in question arrived, to *wait thirty days, in order to give every chance for her arrival, and then to make an insurance on the goods: and the letter was received, and the agent, having waited more than thirty days, made an insurance through a broker, who informed the underwriters when the ship which had the goods on board sailed, and when the letter ordering the insurance was written, but did not state when it was received, nor the order to wait thirty days after the receipt of it: the assured having brought an action on the policy, and failed on account of the suppression of the above facts by the broker, (*a*) the present action was brought against the broker for negligence in making the policy. It was, likewise, held in this case, that though the opinion of brokers and underwriters might be asked as to matters of practice in their profession, they could not be called to speak as to one of the points upon which the jury would have to give their verdict, *i. e.*, whether the fact concealed was material or not, and whether it ought to be communicated to the underwriters.

In *Chapman* v. *Walton*, (*b*) which was an action against a broker for negligence, where the defendant having made policies of insurance on goods for one Richardson, and Richardson having received a letter from the supercargo, telling him that the voyage was altered, which letter Richardson immediately took to the defendant, telling him "that the voyage was altered, and that he left the letter with him to do the needful with it," it was held that brokers might be called to say, looking at the policies, the invoices of the goods, and the letter, what alterations in the policies a skillful broker ought to have made.

Tindal, C. J., said:—"It is objected on the part of the plaintiffs, that to allow this question to be put to witnesses is, in effect and substance, to allow them to be asked what is the meaning of the letter, whereas the letter ought to

[*540] be allowed to speak for itself; or if there be any doubt upon *the meaning of it, it ought to be determined by the Court and jury, and not by the evidence of insurance brokers, or any other witnesses. It may be admitted, that if such were the real nature of the question, the evidence offered would have been inadmissible. But we think, upon reference to the issue between the parties, it was different. The action is brought for want of reasonable and proper care, skill, and judgment, shown by the defendant, under certain circumstances, in the exercise of his employment as a policy broker. The point, therefore, to be determined, is not whether the defendant arrived at a correct conclusion upon reading the letter, but whether, upon the occasion in question, he did or did not exercise a reasonable or proper care, skill, and judgment. This is a question of fact, the decision of which appears to us to

---

(*d*) 4 Camp. 150.

(*e*) 5 B. & Ad. 840.

(*a*) See Rickards v. Murdock, 10 B. & C. 527, and Durrell v. Bedesley, Holt, 285, *post*.

(*b*) 10 Bing. 57.

rest upon this further inquiry, viz: whether other persons, exercising the same profession or calling, and being men of experience and skill therein, would or would not have come to the same conclusion as the defendant. For the defendant did not contract that he would bring to the performance of his duty, on this occasion, an extraordinary degree of skill, but only a reasonable and ordinary proportion of it, and it appears to us that it is not only an unobjectionable mode, but the most satisfactory mode of determining this question, to show by evidence whether a majority of skillful and experienced brokers would have come to the same conclusion. And there is no hardship on the plaintiffs by this course of proceeding, for they might have called members of the same profession or trade to prove opposite evidence, and the jury might have decided between such conflicting testimony, according to the relative skill or experience of the witnesses on either side, or according to the strength of the reasons which were advanced by the witnesses in support of their respective opinions."

5. In the case of *Corlet* v. *Gordon*, (*a*) it was held that an agent cannot delegate his authority to another, and therefore, *when a merchant [*541] in this country receives from a merchant abroad, with whom he had no previous connexion, a bill of lading, inclosed in a letter, requesting that an insurance might be made on the goods, and the merchant declining to do business for the consignor, indorsed the bill of lading to a person who was his friend, and creditor, who received the goods, and afterwards failed, with the proceeds in his hands; it was held that the merchant who had his election either to accept or reject the bill of lading, but was bound, if he accepted it, to comply with the terms of the consignment, and himself to insure and sell the goods, was liable for the consequences arising from his misconduct.

6. If a principal give instructions to an agent to insure upon certain terms, and the agent finds that he is not able to effect the insurance on those terms, it would seem that there is an implied duty, requiring him to give notice to his principal of the fact in order that the latter may have the opportunity of getting the policy made elsewhere, or of acting in what manner, under the circumstances, he thinks best: and if the agent makes the insurance on terms different to those required of him, he is guilty of a breach of duty.

Thus, in the case of *Callandar* v. *Oelrichs*, (*b*) where the plaintiff who was a corn-dealer, employed the defendants, one of whom resided in *London*, the other at *Baltimore*, as agents, to dispose of a cargo of wheat, shipped on his account from *London* to *Baltimore*. On the 22nd of *April*, the wheat being then on board, the defendants received from the plaintiff instructions to make an insurance on the wheat, with a clause declaring it subject to average above 10*l*. The defendants (who were not insurance brokers, and did not appear to have made any policies on behalf of the plaintiff) in a letter dated 22nd *April*, acknowledged the receipt of the plaintiff's letter of the 22nd, but took no notice of the order to insure. They, however, applied at two offices, but not at *Lloyd's*, to get the insurance done, but in consequence [*542] *of the vessel being E. 1, they were unable to make it on the terms mentioned in the plaintiff's letter. Their inability to get a policy made pursuant to their instructions, was not communicated to the plaintiff: and they subsequently insured upon the common policy, "free from average, unless general, or the ship be stranded." Mr. Justice *Coltman* left it to the jury to say whether or not it was a condition to be implied from the nature of the transaction, that the defendants should give notice to the plaintiff of their inability to make the insurance on the terms mentioned in the plaintiff's letter of the 22nd of *April*. The jury found that it was, and returned a verdict for the

(*a*) 3 Camp. 472. (*b*) 6 Scott, 761, 5 B. N. C. 58.

plaintiff. A rule for a new trial having been obtained, on the ground that it did not appear there had been any express undertaking on the part of the defendants to give the plaintiff notice; it was argued, on the part of the defendants, that although where the contract was to be implied from a course of dealing or employment between the parties, it was competent to the plaintiff to declare upon it according to its legal effect, that he could not do so in the case of an express mercantile contract. The allegation in the declaration in question was the following, viz:—"that the defendants undertook and faithfully promised the plaintiff to use due and reasonable diligence in the premises, and faithfully to discharge and execute their duty as such agents, and in the event of any difficulty arising in making such insurance, or in case they should be prevented making such insurance, on the terms aforesaid, to give notice thereof to the plaintiff within a reasonable time."

Tindal, C. J.—"I am of opinion that the rule that has been obtained for a new trial in this case must be discharged. The question arises on a declaration upon an action against agents, in which the duty of the agents is stated to be to cause certain wheat of the agents to be insured on certain terms, or in the event of their not causing the same to be so insured, to give notice to the plaintiff within a reasonable time that they had not done so: and the breach assigned [*543] is that the defendants, disregarding their duty as such agents, *made an insurance upon the wheat upon terms different from their instructions, and omitted to give the plaintiff notice as aforesaid, whereby the plaintiff sustained an average loss. The objection is that there was no evidence given at the trial of any promise by the defendants to give the notice stated in the declaration; and the question is, whether this part of the promise is not matter that the law will infer from the general duty cast on the defendants. The question is whether or not the giving of notice is a legal liability resulting from the situation of the parties? I am of opinion that it is. The defendants' duty would not be well performed, unless they communicated to the plaintiff the fact that they were unable to make the insurance upon the terms proposed. See the situation of the plaintiff; the failure of the defendants to communicate to him the terms upon which alone they were able to insure the wheat, prevented him from getting it done elsewhere, which possibly he might have succeeded in doing. The case seems to me to fall within the principle of *Smith* v. *Lascelles*, (*a*) where it was held that if a merchant here has been accustomed to procure insurances for his correspondent abroad, in the usual course of trade, the latter has a right to expect an insurance at the hands of the former, unless notice be given to the contrary." The rest of the Court concurred, and the rule was discharged.

A very recent and important case on this subject was argued in the Common Pleas, Michaelmas Term, 1842. The case was *Turpin* v. *Bilton*, (*b*) and was an action on the case against the defendant, an insurance broker, for not making an insurance according to his undertaking. The declaration, after stating the retainer and employment of the defendant to cause an insurance to be made on the plaintiff's ship, tackle, &c., and the defendant's acceptance of such retainer and employment, alleged, by way of breach, that, although a reasonable time had long before the commencement of this suit elapsed, and [*544] before the loss of the ship, yet the defendant *did not, nor would, within a reasonable time, cause to be made, according to the custom of merchants, insurance upon the said ship, tackle, &c., and did not, nor would cause the same to be insured, nor cause a policy of insurance to be made, subscribed, and underwritten thereon, from and against the perils of the sea,

(*a*) 2 T. R. 186. (*b*) 6 Scott, N. R. 447.

and other risks usually borne by underwriters, nor did nor would cause the plaintiff to be insured, in respect of the said ship, tackle, &c., from and against the perils aforesaid; nor did nor would cause to be made thereon any insurance, or policies of insurance, subscribed or underwritten; but the defendant so to do had wrongfully, and in breach of his duty and retainer and acceptance thereof, wholly neglected and refused, and still did neglect and refuse. It appeared in evidence, at the trial of the cause before *Maule*, J., at the last assizes at *Newcastle*, that the defendant had, shortly after he had been employed to do so, contracted with the *Newcastle Commercial Insurance Company* for an insurance on the plaintiff's ship, &c., and shortly afterwards obtained from the secretary of the company what purported to be copies of the policies. Stamped policies were afterwards subscribed, but not given out, it being the practice of the company to retain them in their possession till wanted in consequence of a loss. There was no precise evidence as to the time when the stamped policies were executed, the evidence being that it was usual to execute them very shortly after the order. To a demand for the policies on the part of the plaintiff, the defendant sent an evasive reply. On the part of the defendant, it was insisted that the correspondence that was given in evidence amounted to an admission on the plaintiff's part that the policies had been made shortly after the order was given, and that the evidence as to the usage of the company was conclusive to show that there had been no breach of duty by the defendant. On the other hand, it was submitted, that the inference to be drawn from the correspondence was, that there were no policies made. The learned Judge left it to the jury to say whether or not the defendant had procured the policies to be made within a *reasonable time. The jury returned a verdict for the plaintiff on the first count, damages 30*l*. A rule *nisi* for a new trial, or, in the case of that being refused, for arresting the judgment. The Court took time to consider; and in Hilary Vacation, 1843, Chief Justice *Tindal* delivered the judgment of the Court, and, after detailing the allegation in the declaration, and the evidence given in the case, said, "These conflicting views were placed before the jury, who, it would appear, drew their conclusion in favour of the plaintiff; and my brother *Maule*, who tried the cause, appears satisfied with their finding. A second prayer of the motion was, that the judgment should be arrested. And the objection taken in arrest of judgment is, that the duty cast upon the defendant by the contract into which he entered was not an absolute duty, as alleged in the declaration, to make an insurance at all events, as in the nature of a warranty, but that it was a mandatum only, and that the defendant was bound only to use a proper degree of care and diligence to perform what he had undertaken. But to this we think the proper answer has been given at the Bar, viz: that the action is founded on an express contract, and that the breach is not larger than the terms of the contract, but is framed in the same precise terms; and that the allegation, that the defendant to perform his promise, 'wrongfully, and in breach of his duty and retainer, and of his acceptance thereof, wholly neglected and refused,' is a legal charge on the face of the declaration, and sufficient to call on the defendant for an answer; leaving it to the defendant, if he thought to excuse himself on the ground of impossibility of finding persons ready or willing to underwrite the particular risk, or on any other justifiable ground of excuse, either to shew it in evidence at the trial, as an answer to the breach so alleged, or to plead by way of excuse as he should be advised." Rule discharged.

[*545]

If the neglect complained of be the non-communication of a material fact to the underwriters in making the insurance, the policy was avoided, the agent may make it appear, by way of defence, that the fact, if communicated, would have made *it impossible to get insurance at the premium limited in his instruction. Thus a shipowner in *London* directed a broker

[*546]

at *Hull* to insure a ship, then on a voyage from *London* to *Hull*, limiting the premium to be given, and communicating the day of the ship's sailing from *London*. The broker made the policy without any delay, but concealed the day of the ship's departure. Upon that ground, the assured having been nonsuited in an action brought upon the policy, brought another action against the broker for neglecting to make the proper communication, in which the latter was permitted to show, in his defence, that no insurance could have been made at the limited premium, if the date of the ships departure had been communicated, that date being such as would have made her to be considered as a "missing ship" at the time the order was received. (*d*)

II. I shall now proceed, in the second place, to consider what are the respective rights and liabilities of the three parties, the assured, the broker, and the underwriter to each other, and in what mode, when a loss has occurred, a settlement of the account between them takes place. The underwriter has to receive his premium, the broker his commission for making the insurance, and, when a loss has occurred, the assured has to receive the proceeds of the settlement of the loss.

I have already observed that, in *English* policies, the premium is always expressed to have been received at the time of underwriting: "we, the assurers, confessing ourselves paid the consideration due unto us for this assurance by the assured." This being subscribed by the underwriter, it is proper to inquire, whether, if the premium were not actually paid at the time, he could afterwards maintain an action against the assured, who could then produce his subscription as evidence against himself. Mr. J. *Park* says, "that there is an old case upon the subject, which, however, is not at all satisfactory. (*e*) It was [*547] an action of assumpsit, and the plaintiff *declared that the defendant was indebted to him in 20*l.* for a premium of insurance on such a ship. The defendant demurred specially, because the plaintiff did not show the consideration certainly what the premium was, or how it became due; but the objection was not allowed, for this is as good as an "*indebitatus pro quodam salario*," which has been adjudged good. Here, however, there is no decision upon the merits, nor does it appear whether the defendant was the broker or the assured himself. In practice, however, policies are made by the intervention of the broker, and open accounts are kept between the underwriters and brokers, in which case the underwriter may have an action against the broker for premiums received to his use."

This acknowledgment on the face of the policy of the receipt of the premium by the underwriter is conclusive as between him and the assured, except in the case of fraud. (*a*) And, therefore, in the case of *Dalzell* v. *Mair*, (*b*) which was an action for money had and received brought by the assured against the underwriter for a return of premium, the underwriter cannot be admitted to say, that the broker who made the policy on behalf of the plaintiff had not paid any part of the premium. But as between the underwriter and broker the receipt is no bar to an action. This was decided before Lord *Mansfield* in the case of *Airy and others, Assignees, &c.*, v. *Bland.* (*c*)

(*d*) Anon. cor. Chambre, J., York Summer Assizes, 1808. This case is taken from Paley's "Principal and Agent," 3rd edit. p. 20.

(*e*) Fowk v. Pinsacke, 2 Lev. 153, and Park Ins. 810.

(*a*) But where it appears that a fraud has been practised on the underwriters in collusion between the broker and assured, he may maintain the action notwithstanding the receipt on the policy. Foy v. Bell, 3 Taunt. 493. Mason v. Simeon, 3 Taunt. 497.

(*b*) 1 Camp. 532.

(*c*) Trin. sit. at Guild. 14 Geo. 3, Park Ins. 811.

It was an action brought by the plaintiffs, as assignees of Milton, who was a broker at *Newcastle*, and who had procured an insurance to be made by different persons for the defendant. The declaration stated, that in consideration that the bankrupt would procure an insurance to be made on the ship *Jason*, and would procure 600*l.* to be insured thereon *by good and sufficient persons, the defendant promised that he would pay [*548] the bankrupt the premium, and a reasonable sum for his trouble. The first question was, whether credit was given by the underwriters to the assured, or to the broker, where the premium was not paid down at the time the assurance was made. Milton, the bankrupt, swore, that in *May*, 1761, he was told by the underwriters that they should look upon him as their debtor, and that they would have nothing to do with the assured, which was considered at *Newcastle* as the *London* practice; that from that time he had always acted upon this plan, and had paid, since that time, 1,000*l.* to the underwriters, which he had never received. His commission was 5*l.* per cent. *London* insurance brokers were then called, who said, they understood the underwriters looked to them only; and that the underwriters did not once in ten times know who the assured were; and that in case of failure the underwriters came upon the effects of the broker; the broker upon those of the assured. Lord *Mansfield* said, "The plaintiffs' case is stronger than referring to the general usage in *London*, for they act by a specific rule, which they suppose to be the rule in *London*; and if the usage in *London* was doubtful, still the plaintiffs would be entitled to recover." There was a verdict for the plaintiffs. (*a*)

And, therefore, it was held in the case of *De Gamind* v. *Pigou*, (*b*) in an action by the assured for a total loss against *the underwriter, it [*549] was held that the latter could not as against the assured set off the premiums, although they had never been paid him by the broker.

2. But in *Power and another, Assignees, &c.*, v. *Butcher*, (*c*) it was held that although the underwriter is estopped by the acknowledgment on the policy of the receipt of the premium, from suing the assured, the assured, however, is not discharged from his liability to the broker, and is liable to him in an action; and it would seem that the broker can recover the premium from the assured, even though he has not paid it to the underwriters, if he has entered into any contract whereby he has made himself liable to them for it. The insurance broker made, on behalf of another person, a policy under seal with a company of which he was a member. The policy recited that the broker, upon his representation that he was duly authorized as owner, agent, or otherwise to make assurance upon the vessel mentioned in the policy, and was desirous of making such insurance, had covenanted with the company to pay the premium, and then alleged that in consideration of the premises, and of such covenant the policy was made; the broker having become bankrupt without having paid the premium to the company, it was held that his assignees were entitled to recover from the assured the amount of the premium which he had

(*a*) The learned reporter of the case of Dalzell v. Mair, makes the following sensible observations upon the case of Airy v. Bland. "The object of the formal acknowledgment of the receipt of the premium inserted in the policy is probably to preclude the necessity of proving it when a loss happens, and to prevent the underwriters from objecting, that there was a want of consideration for their promise, in case the broker has not paid them. The receipt is no bar to an action by the underwriter against the broker; and the distinction seems to be this, that as between these parties it is no evidence at all, but that as between the underwriter and the assured it is conclusive. It follows as a consequence from this decision, that an action cannot be maintained for premiums or insurance by the underwriter against the assured, which has hitherto been *vexata questio*."

(*b*) 4 Taunt. 247. (*c*) 10 B. & C. 329.

covenanted to pay. And as it was proved that the company would have allowed the broker when he paid the premiums, to deduct 31*l.* 1*s.* for commission, it was held that his assignees were entitled to recover that sum under the words in the declaration, "work and labour" done by the broker, and under the word "insurance" in the particulars of demand.

Bayley, J., said,—"It seems to me that the plaintiffs are entitled to the judgment of the Court. This is an action by the assignees of an insurance broker for work and labour, and premiums, against the defendants, who are shipowners, and had employed the broker to make certain policies in their behalf, which he did make with a company of which he was a member. Now,

[*550] according to the ordinary course of *trade between the assured, the broker and the underwriter, the assured do not in the first instance pay the premium to the broker, nor does the latter pay it to the underwriter. But as between the assured and the underwriter, the premiums are considered as paid. The underwriter, to whom, in most instances the assured are unknown, looks to the broker for payment, and he to the assured. The latter pays the premium to the broker only, and he is a middle-man between the assured and the underwriter. But he is not solely agent; he is a principal to receive the money from the assured, and pay it to the underwriter. In this case the policies were not in the ordinary form, but by deed, and the broker covenanted to pay the premiums to the underwriters; and in consideration of the covenant, the policies were made. The underwriters thereupon took a covenant from the broker to pay the premium, instead of acknowledging the receipt of the premium as they do in ordinary cases of a policy by simple contract. In such a case the action would be maintainable at the suit of the broker, on the principle that he was entitled to call upon the assured for the payment of those premiums which he had become liable to pay to the underwriters, and which they had acknowledged the receipt of. The assured have had the benefit of the policies, and if the underwriters were liable upon the risk, they were warranted in calling upon the broker to pay the premiums. In point of justice the assured ought to pay the broker, or in the event which has happened, his assignees. In an ordinary case the assurers would have no claim upon the assured for the premium, because, by the policy, they acknowledge the receipt of it. Here, there is no such acknowledgment, and therefore it may be said the assurers may claim the premiums from the assured, a contract cannot be raised by an implication of law, except in the absence of an express contract. Now, here there was an express contract between the underwriters and the assured, through the agent, and by that contract the underwriters agreed to look to the broker alone for the premium. Then it is necessary to consider in what

[*551] *situation the broker stands, in order to see whether he is entitled to call upon the assured for the premium. The underwriters have a claim upon him for the full amount of premiums; and, if that be so, he ought to recover those premiums from the persons who have had the benefit of the policies. But a difficulty arises from the peculiar form of the declaration, and the particulars of the plaintiff's demand. It seems to me that he cannot recover the premiums, as money paid to the defendant's use, because the bankrupt never actually paid any money, but when we look at the form of the declaration, and leave out parts which may be fairly omitted, I think the plaintiffs may recover the full amount of their demand; and I am of opinion that they are entitled to recover the 31*l.* 1*s.*, which may be considered as a compensation for the work and labour of the broker in making the insurance."

3. In the case of *Edgar* v. *Bumstead*, (*a*) it was held, that where after the happening of a loss the broker paid the subscription of one of the underwriters

(*a*) 1 Camp. 411.

to the assured, he could not recover it back again from the assured, upon discovering the fact of the insolvency of the underwriter.

The plaintiff being an insurance broker, got a policy underwritten for the defendant, a merchant, on the ship *Alfred*, which was subscribed (amongst others) by one *Lomos*. A loss happened, whereupon the plaintiff paid the full amount of the sum insured to the defendant. Previously to this, *Lomos* had become insolvent, without the plaintiff being aware of the fact; and it was now contended that he had a right to recover the sum he had paid to the defendant in respect to *Lomos's* subscription, as money paid under a mistake of the fact. But Lord *Ellenborough* held that an account of the well-known course of dealing between the insurance broker, the merchant, and the underwriter, the money could not, under those circumstances, be recovered back from the assured."

*The question of credit for premiums between the broker and underwriter, arose in the case of *Edgar and another, Assignees, &c., of Carden*, v. *Fowler and another*, (*a*) an action brought by the assignees of a bankrupt underwriter against the brokers, for premiums supposed to have been received by the latter from the assured, for policies which they (the brokers) had procured the bankrupt to subscribe as an underwriter. For these very premiums the brokers had given the underwriter credit in their account with him, and had again taken credit for them in their account with the assured. The counsel in the cause, the very learned Judge, (Mr. Justice *Le Blanc*,) before whom it was tried, and Lord *Ellenborough* and the other Judges of the Court of King's Bench, before whom it was brought upon a case reserved for their opinion, never seem to have doubted, that the underwriter may maintain an action directly against the broker for premiums. But that case was decided, as to the main point, in favour of the broker, because the premiums in question were for re-assurances, which are illegal by the 19 Geo. 2, c. 37, and which the broker had not in fact received from the assured, but only credit for them had been given in account between the broker and underwriter. [*552]

4. The relative situation, in which broker, assured, and underwriter stand to each other, has been more frequently discussed of late years upon questions of premium, on account of several failures, which made the decision of these points of consequence to their respective estates.

A question of this nature arose about 1786, in the case of *Grove* v. *Dubois*, (*b*) when it was held that in an action by the assignees of a bankrupt underwriter against the broker, for premiums of insurance upon policies underwritten by the bankrupt for the broker in his own name: the broker having a *del credere* commission from his principal, might set off under the general issue upon the statute of 5 Geo. 2 (*c*) respecting mutual credit, losses which had happened before *the bankruptcy, and for which premiums the underwriter had debited the broker. [*553]

This doctrine was soon after extended to a case of *Bize* v. *Dickason*, (*a*) where, though the loss had happened before, the adjustment did not take place till after the bankruptcy.

In the next case, *Shee* v. *Clarkson*, (*b*) the Court of King's Bench, held, that as the broker is the mutual agent both of the assured and underwriter, while the premium remains in his hands, for the use of the underwriters, if he receive notice of an event entitling the assured to a return of premium, before any action brought against him for the whole of the premium, he is entitled to

---

(*a*) 3 East, 222.
(*b*) 1 T. R. 112.
(*c*) See 6 Geo. 4, c. 16, s. 50.
(*a*) 1 T. R. 287.
(*b*) 12 East, 507; and see Lord C. J. Mansfield's opinion in 4 Taunt. 248.

deduct such returns, and only to pay over the difference to the underwriter, he never having parted with the policies. In this case there was no bankruptcy, and of course no question about mutual credit.

But in the next case of *Minett, Assignee of Barchard* v. *Forrester*, (*c*) a bankruptcy had happened, and the Court of Common Pleas were clearly of opinion, that the broker is the agent for both parties; first, for the insured in effecting the policy, and in every thing that is to be done in consequence of it, then he is agent for the underwriter as to the premium, but for nothing else; and that when once a bankruptcy had taken place, the broker cannot, in any sense, be said to be an agent for the underwriter, as the authority given by the underwriter himself ceases after his bankruptcy; and when he became a bankrupt, his right to the premium was immediately communicated to his assignees. That Court therefore held, that an insurance broker indebted to a bankrupt underwriter for premiums, cannot, without some special authority, set off against that debt sums due to the assured for return of premium, whether those returns became due after or before the bankruptcy. And relying on the above
[*554] decision, they decided accordingly, as to returns of premiums *for arrival, which had taken place after the bankruptcy. (*a*)

In a subsequent case of *Glennie* v. *Edmunds*, (*b*) here an action was brought by the assignees of an assured, who had become bankrupt, and who always acted as his own broker, for a total loss, the underwriter was not allowed to set off as a mutual credit, premiums due from the bankrupt upon that and other policies. It does not appear that the statute of 19 Geo. 2, c. 32, which enables the assured to claim against bankrupt underwriters, as if the loss had actually happened, was observed upon at the Bar. Supposing both parties had become bankrupts, the assignees of the assured could have claimed the loss against the estate of the underwriter. Would not the equity of the same statute have allowed the premiums to be set off; and as no broker intervened in this case, may it not be considered that this is strictly a case of mutual credit? (*c*)

In *Parker, Assignee of Parker*, v. *Smith*, (*d*) which was an action by the assignees of an underwriter against insurance brokers for the balance of an adjusted account, and also for premiums due to the bankrupt upon policies underwritten before the bankruptcy, the brokers are not entitled to deduct for returns of premium which formed a part of the adjusted account, but where the events entitling them to the return were not known till after the adjustment: neither can the brokers deduct for returns of premium on policies, for the premiums of which the action is brought, the events entitling them to which returns happened before the bankruptcy, but were not adjusted; neither can they deduct where the events happened since the bankruptcy, but before the commencement of the action, the brokers having neither a *del credere* commission, (a circumstance which we shall presently see, the Court considered as
[*555] making no difference,) nor being personally *interested in the insurance. In giving the judgment, the Court expressly founded it upon a conformity to that of *Minett, Assignee of Barchard*, v. *Forrester*, in the Court of Common Pleas. (*e*)

In *Grove* v. *Dubois*, and *Bize* v. *Dickason*, there was a *del credere* commission, a fact which pressed in the case of *Cumming* v. *Forrester;* (*f*) but Lord *Ellenborough* said, in giving judgment, he could not conceive how a contract between A. and B. can vary the rights between B. and a third person,

---

(*c*) Goldschmidt v. Lyon, 4 Taunt. 534.
(*b*) 4 Taunt. 775.
(*c*) See Graham v. Russell, B. R. Michaelmas, 57 Geo. 3. Park Ins. 814; and see now 6 Geo. 4, c. 16, s. 53.
(*e*) *Ante*, p. 553.
(*a*) See 6 Geo. 4, c. 16, ss. 50, 51.
(*d*) 16 East, 382.
(*f*) 1 M. & S. 494.

who is a stranger to it, and empower B. to set up a claim against him as derived out of that contract. And therefore the Court decided, that where a broker made policies in the name of his principal under a *del credere* commission, he could not set-off against an action for the premium total losses which happened on those policies, although the broker had accounted for them with his principal.

In this last case there was no bankruptcy, and Lord *Ellenborough* also observed, that in *Grove* v. *Dubois*, the policy was filled up in the name of the broker, and the whole dealing was between the broker and the underwriter.

He also made a similar observation in the case of *Koster, Assignee of Swan* v. *Eason*, (*c*) where the Court of King's Bench held, after time taken to deliberate, that in an action brought by the assignees of a bankrupt underwriter, the broker could only set off such losses and returns as were due on policies made in the broker's own firm, such losses and returns having become due on those policies before the underwriter stopped payment, though never adjusted by the bankrupt, and for the amount of which losses and returns the broker had given their principals credit. But the Court also decided that the broker could not set-off, where the policies were made in the name of the principals themselves, though the broker had a *del credere* commission.

And in a subsequent case of *Parker* v. *Beasly*, (*d*) the *Court of King's Bench, adopting the distinction just made, decided, that [*556] where brokers made policies on goods on account of their principals, but in their own names, and accepted bills drawn on them on the goods which were consigned to them, and lost before their arrival, held, that the broker might set off such losses against the assignees of the bankrupt underwriter, though there was no commission *del credere*, nor any adjustment.

5. The main point in all these cases is, that bankruptcy determines agency, and vests all the bankrupt's rights in the assignees; and that the broker acted under a *del credere* commission, cannot be in any other situation with respect to a third person than he would be without it; but that wherever all the dealings are between the underwriter and broker as principal, and the underwriter knows him in no other character, there the rights of a principal attach upon him.

In the case of *Houston, Executor*, v. *Robertson*, (*a*) the Court of Common Pleas, in conformity to the principle of all the above decisions, held that death was to be put on the same footing as bankruptcy; and that as the bankruptcy in the one case caused the authority of the agent to cease, so did death in the other. The interest in the one case became vested in the assignees; in the other, in the executors. And therefore they held, that in an action by the executors of an underwriter against a broker for premiums due on policies subscribed by their testator, the broker could not set off returns of premium which became due after the death of the testator.

6. Having now referred to the principal decisions to which the Courts, in the earlier cases, came upon this subject, and to the effect which they held that the bankruptcy or death of the underwriters had upon the running accounts between them and the broker, I shall now proceed to consider the more recent cases in which the effect, which passing the accounts between the broker, the underwriter, and the *assured, according to a known custom of *Lloyd's*, has in discharging the debt of the underwriter to the latter, [*557] been fully discussed and settled.

It has been already observed that the insurance broker is agent both for the assured and the underwriter. His duty to the assured is to receive from the

---

(*c*) 2 M. & S. 112.
(*a*) 2 Marsh. 138.
(*d*) 2 M. & S. 423.

underwriter the proceeds of the settlement of a loss, and his duty to the underwriter is to pay them, when received, to the assured. Although the policy contains an acknowledgment, that the premium has been paid by the assured to the underwriter, it is not usual for the broker to pay it at the time of making the policy, but the underwriter gives him credit for it, and looks to him for payment, and at that time frequently knows nothing whatever of the assured. But when a loss happens, a debt then arises to the assured from the underwriter, and the latter can only discharge that debt, either by payment to the assured himself, or to his agent lawfully authorized to receive it.

Lord *Tenterden*, in *Scott* v. *Irving*, (*a*) says, "the general rule is, that the broker is debtor to the underwriter for the premium; and the underwriter is debtor to the assured for the loss." When the broker has made the insurance, he usually remits the policy to the assured, and when a loss occurs, the assured sends it back again to the broker, and thereby renders him his agent to settle with the underwriter. Now the well known rule of law respecting agents receiving money on behalf of their principals is this, that "where a creditor employs an agent to receive money from his debtor, and the agent receives it, the debtor is discharged as against the principal; but if the agent, instead of receiving money, writes off money due from him to the debtor the latter is not discharged." (*b*) But, in cases of insurance, this general rule of law is relaxed by a usage, amongst merchants, insurance brokers, and underwriters in the city of *London*, to set off the general balance of the accounts between the broker and the underwriter, at the time of the loss, against the loss, and [*558] *for the broker then to debit himself to that amount in his account with the assured; and that this is considered, by the custom, a discharge, by the underwriter, of his debt to the assured. The Courts have been very slow in suffering this usage to infringe the above-mentioned general rule of law, but it now may be considered as decided, that when the usage is within the knowledge of the assured, and assented to by him, this passing of the accounts between the broker, the underwriter and assured, operates as a payment to the latter, and an extinguishment of the underwriter's debt.

Lord *Abinger*, in delivering the judgment of the Court of Exchequer in the recent case of *Stewart* v. *Aberdein*, (*c*) when this subject was fully discussed, concludes in these words: "it must not be considered that by this decision the Court means to overrule any case deciding that when a principal employs an agent to receive money, and pay it over to him, the agent does not thereby acquire any authority to pay a demand of his own upon the debtor by a set off in account with him. But the Court is of opinion that where an insurance broker, or any other mercantile agent, has been employed to receive money for another, in the general course of his business, and where the known general course of business is for the agent to keep a running account with the principal, and to credit him with sums he may have received by credits in account with the debtor, with whom he also keeps running accounts, and not merely with moneys actually received, the rule laid down in these cases cannot be properly applied, but it must be understood that where an account is *bonâ fide* settled according to that known usage, the original debtor is discharged, and the agent becomes the debtor, according to the meaning and intention, and with the authority of the principal."

As the principles of law settled by these cases are of great importance, I feel compelled to refer to them at some length.

(*a*) 1 B. & Ad. 612.
(*b*) Per Lord Tenterden, in Russel v. Bangley, 4 B. & Ad. 398.
(*c*) 4 M. & W. 228.

The first case is that of *Russel* v. *Bangley*. (*a*) It was *an [*559] action on a policy of insurance subscribed by the defendant for 150*l.* The policy was made in *October*, 1819, by one Savery, a broker, who returned it to the assured. A loss having afterwards happened, the plaintiff delivered it back to Savery to get the loss adjusted. On the 15th of *March*, the loss was adjusted by the defendant, payable at one month. Savery then made out and transmitted to the plaintiff his account current, in which he made him debtor for various premiums upon former policies, and credited him with 150*l.*, the amount of the loss upon the policy, and the balance due to the plaintiff on this account was 133*l.* 4*s.* For that sum the plaintiff drew a bill at two months on Savery, which the latter accepted. Savery, at the same time, *debited* the defendant with the amount of this loss in his account. The policy remained in Savery's hands, but the name of the defendant was not cancelled. The bill drawn by the plaintiff became due on the 21st of *May*, but was not paid, and soon afterwards Savery became bankrupt. It was proved that it was usual in the insurance business for the broker to settle with the underwriter according to the state of the account between them. If the account was against the underwriter, the latter paid the amount of the loss or the balance (after deducting the premium) to the broker at the expiration of the month, but if the account was in his favour, then no money passed to the broker, but the latter *debited* the underwriter with the loss, and settled the balance of the account at the end of the year. Between the assured and the broker the balance is either paid or carried to the credit of the assured, at the option of the latter. At the trial before *Graham*, B., at *Bristol*, the plaintiff was nonsuited, with liberty given him by the learned Judge to move to enter a verdict. A rule *nisi* having been obtained, after the argument, *Abbott*, C. J., said, "The general rule of law is, that if a creditor employs an agent to receive money from a debtor, and the agent receives it, the debtor is discharged as against the principal; but if the agent, instead of receiving money, writes off money due from him to the debtor, then *the latter is not discharged. In cases of insurances, [*560] usage may possibly introduce a different rule; but at all events an underwriter has never been considered discharged as against the assured, until his name has been struck off the policy. If the underwriter relies on his communication with the broker as discharging him without actual payment of the money, he should insist that his name should be struck off the policy. If that be done, and the plaintiff then forbears to call upon him for payment within the period warranted by the usage of trade, then the underwriter may be discharged, but not otherwise." The rest of the Court were of the same opinion, and the rule for a new trial was made absolute.

Todd v. *Reid*, (*b*) was decided in the same year with *Russel* v. *Bangley*, and previous to it. The case is very shortly reported. And the opinion of *Abbott*, C. J., expressed at the trial respecting the usage, was afterwards qualified by him (as we have seen) in giving judgment in *Russel* v. *Bangley*, and the general terms made use of by the Court must be considered now as inconsistent with the more recent decisions.

The next case in order of time, was the important case of *Bartlett* v. *Pentland*, (*c*) argued in Easter Term, 1830, in which the usage and practice of *Lloyd's* were brought fully before the Court. In this case likewise, the Court held that the underwriter was not discharged by a settlement with the broker. But the reason of this decision appears to have been that the circumstances raised a strong presumption that the plaintiffs were ignorant of the usage, and

(*a*) 4 B. & A. 395. (*b*) 4 B. & A. 210.
(*c*) 10 B. & C. 760.

that they merely commissioned Mitchell, the broker, to receive for them the loss, and pay it over to them, "stating that he knew better how to act than they, as they never had a loss before," and it was, therefore, impossible for them to be considered to have had such a knowledge of the custom for them to authorize the broker to make such a settlement for them with the underwriter.

[*561] *The case of *Scott* v. *Irving*, (*a*) was decided in Michaelmas Term, in the same year. It was an action on a policy of insurance "at and from *Gibraltar* to *Havannah*, on a cargo of cottons, by the *Union*." At the trial before Lord *Tenterden*, C. J., at *Guildhall*, a verdict was found for the plaintiff, damages 100*l.*, subject to the opinion of the Court, on the following case:—

On the 27th *July*, 1824, a cargo of cotton, the property of the plaintiff, was shipped on board the *Union* at *Gibraltar*, to be carried thence to *Havannah*. On the 3rd *September*, 1824, the plaintiff, who resided at *Glasgow*, wrote to Mitchell, an insurance broker at *Lloyd's*, to get 100*l.* insured; and accordingly the defendant, an underwriter at *Lloyd's*, subscribed the policy on which the action was brought, and which stated, on the face of it, to be made by Mitchell, agent, on the cotton by the *Union*, "at and from *Gibraltar* to *Havannah*, for 100*l.*, at a premium of six guineas per cent." The policy was in the usual printed form, and contained an acknowledgment that the premium had been paid by the assured to the underwriters. An account had, for several years, been kept between the defendant and Mitchell, in the usual way in which accounts between underwriters and brokers are kept, in conducting business at *Lloyd's*, and Mitchell was *debited* in this account for the premiums on the said policy. The *Union* was afterwards lost. When this became known to the plaintiff, he gave Mitchell directions to obtain a settlement of the loss, and Mitchell laid the policy and papers before the defendant, and other underwriters on the policy, at *Lloyd's*, in the ordinary course of the business there. After some delay, the defendant, on the 8th *March*, 1826, signed his initials to the following adjustment of the policy:—"Settled a loss of 100*l.* per cent. on this policy, payable in a month;" and the defendant at the time struck his pen through his subscription to the policy, and also through his initials of the settle-

[*562] ment of the loss. On the *25th *March*, 1826, the defendant and Mitchell had an account then standing between them. In that account Mitchell was *debited* 46*l.* for various premiums, and 100*l.* was placed to his credit on account of the loss per *Union*. The defendant paid Mitchell 54*l.*, and took a receipt for that sum, stated to be the balance of loss per *Union*. There were no transactions between the defendant and Mitchell after this settlement. On the 3rd *April*, 1826, Mitchell wrote to the plaintiff that he had got the last underwriter on the policy to sign it off, and enclosed a statement of the account, balance 554*l.* 7*s.* to the plaintiff's credit for which he was at liberty to draw in the usual way. In the account in the letter, the plaintiff had a credit of 700*l.* loss by the *Union*. On the 7th *April*, the plaintiff drew on Mitchell, at ten days' sight, for 554*l.* 7*s.*, stating at the same time, by letter, that he did not know at what time it was usual to draw for such a balance, this being the first total loss he had ever had in *London*. Mitchell refused to accept the bill, and, on the 15th *April*, wrote to the plaintiff, stating that he could not, under any circumstances, have accepted it, unless drawn by permission; but, that, in consequence of difficulties, he had been compelled to suspend payment. He further stated:—"The custom of *Lloyd's Coffee House* is to wait one month after the loss is signed off, and then draw at three. When the underwriters sign off, it is to pay in one month, and is generally settled

(*a*) 1 B & Ad. 605.

when the accounts can be made out and agreed; but it often happens, that a broker has little or no part of the loss to receive, as the underwriters may have sufficient premiums at their credit to cover the loss. Of the loss per *Union*, I have received 208*l.* from the underwriters; and it is a matter of great regret to me that I received any of it."

Evidence was given, on the part of the defendant, that it is not usual for the broker to pay the premium on making the policy; that an account is kept between the broker and underwriter to the end of the year, when they strike a balance, averages, deductions, and returns, being placed to the credit *of the broker; but losses, if they exceed the amount due [*563] from the broker at the time when they are known, are settled before the end of the year; and on that settlement the amount due from the broker for premiums up to the date of the knowledge of the loss is set against the loss. On adjustment of losses, payment is generally made in about a month, but sometimes the underwriter pays sooner. The month is an indulgence to the underwriter. The assured may interfere by himself or by another broker. If a broker who has not made the policy comes to settle the loss, the authority of the principal is required. It is a general practice for the broker to charge the merchant with the premiums up to the expiration of the month allowed by the underwriter, and accept a bill at three months for the balance. After the argument at the Bar, in which the preceding cases were referred to,

Lord *Tenterden*, C. J.—"I am of opinion that the plaintiff is entitled to recover the sum of 46*l.*, the amount of the premium due from the broker to the underwriter, and allowed in account with them; but not the sum of 54*l.*, which was actually paid in money by the defendant to the broker. The general rule is that the broker is debtor to the underwriter for the premium, and the underwriter debtor to the assured for the loss. If the usage relied upon in this case were allowed to prevail, it would have the effect of making the broker, and not the underwriter, the debtor to the assured for the loss. Such a usage, however, can be binding only on those who are acquainted with it and have consented to be bound by it. There may, possibly, be cases proved where an assured, cognizant of such usage, may be supposed to have assented to it, and therefore may be bound. Here no such assent is shown, nor can it be inferred from the delay which has taken place in the prosecution of this claim. If, indeed, in that interval of delay after the receipt of Mitchell's letter of the 15th *April*, the relative situation of the underwriter and broker had been changed, as if the underwriter, on the supposition that the loss had been paid, by the allowance of the 46*l.* on account, had given the broker fresh credit for *other premiums in account, there might have been ground for contending [*564] that the acquiescence of the plaintiff should bind him, as the underwriter would otherwise have been prejudiced. As to the sum of 54*l.*, which was actually paid in money by the underwriter to the broker, I think the plaintiff is not entitled to recover that sum. The ground upon which he claims it is, that the underwriter, by his adjustment, having stipulated to pay in a month, could not discharge himself against the assured by payment to the broker before the end of the month. But the authority given by the plaintiff to the broker was a general authority to receive payment in money. The plaintiff, therefore, is bound by the payment so made to the broker, and the verdict must be reduced to 46*l.*" The rest of the Court concurred.

This subject was again brought before the attention of the Court, in the recent case of *Stewart* v. *Aberdein*, (*a*) in the Exchequer, to which I have before referred. In this case the Court thought that there was sufficient evi-

(*a*) 4 M. & W. 211.

dence of a knowledge in the plaintiff of the usage between the broker and underwriters, to make settlements in account, by taking credits in payments. And they held that the underwriter was thereby discharged.

At the trial before Lord *Abinger*, at *Guildhall*, it appeared that the policy was made on the 26th of *September*, 1835, and the defendant was an underwriter upon it for 100*l.* The loss appeared on *Lloyd's* books, in *May*, 1836. At the time of the loss thus appearing, *Douglas, Anderson & Co.*, the insurance brokers, were indebted to the defendant in a balance of 217*l.* 3*s.* 8*d.*, on their underwriting account of the previous year, up to *March*, 1836; and in the month of *June*, their clerk agreed this account with the defendant's clerk, and paid him the sum of 100*l.*, leaving 117*l.* 3*s.* 8*d.* on the account, which was retained to meet the loss on the *Vrow Elizabeth*. The loss was adjusted on the 20th of *September*, by the defendant and all the other underwriters, [*565] *except two, at 97*l.* 11*s.* 8*d.* per cent. A memorandum was then written on the policy, stating the loss to be payable at one month, and the defendant's subscription was struck through, and the loss was then passed into the accounts between *Douglas, Anderson & Co.*, and the defendant, in their respective books, but the account was not formally agreed between them. The plaintiffs had for several years employed *Douglas, Anderson & Co.*, as their brokers, for making insurances in *London*, and the latter had a general account current, as well as an insurance account, with the plaintiffs; each being kept quite distinct, and the balance of the insurance account being at certain periods carried into the general account as cash. The further information required by the two underwriters being laid before them in the early part of *November*, *Douglas, Anderson & Co.*, advised the plaintiffs of the loss being about to be settled by them, the plaintiffs drew two bills for 600*l.* cash, on the 16th and 17th of *November*, and on the 19th of *November*, *Douglas, Anderson & Co.*, enclosed them a credit note for account of the settlement of the whole loss, the amount of which (1155*l.* 3*s.* 10*d.*) they, *Douglas, Anderson & Co.*, carried to the credit of their insurance account, of which they sent an extract, and they debited the plaintiffs to the end of *September*, leaving a balance of 886*l.* 12*s.* 7*d.*, due on 21st of *February*, in the plaintiff's favour, which they transferred to the credit of the general account. At the bottom of the credit note was written, "Above is the credit note of the loss *per Vrow Elizabeth*, 1155*l.* 3*s.* 10*d.*, but without our prejudice, until in cash from the underwriters." On the 21st, 1836, the plaintiffs acknowledged the receipt of these accounts, and stated that they would be examined. On the 26th of *November*, *Douglas, Anderson & Co.* stopped payment, and as soon as the plaintiffs were aware of this circumstance, they demanded payment of the underwriters, and, amongst others, of the defendant, which being refused, the present action was brought. At the trial, several insurance brokers were [*566] called, who stated the usage at *Lloyd's* as to *settlements between the underwriters and brokers to be such as were stated in the former cases, and it was also stated by some of them to be well known at *Liverpool*, as well as in *London*. It was contended for the plaintiffs, on the authority of *Russel* v. *Bangley*, and *Scott* v. *Irving*, that the set-off between the brokers and the underwriter was not binding on the plaintiffs, who were not expressly shown to have any knowledge of the usage; and also that the memorandum at the foot of the credit note showed that the brokers did not treat the settlement as being conclusive, as a payment to them from the underwriters.

The Lord Chief Baron, in summing up, expressed his opinion that the notion had been pushed too far about the actual payment in cash, and that it appeared to him that if one man has to pay another money on account of his principal, and there is money due to him from such other person, it makes no difference to the principal whether there is an interchange of bank notes, or a

mere transfer of accounts from one side to the other, and that it is equally a payment, if it be done without fraud. He, however, left the whole facts to the jury, and directed them to consider whether parties making insurances for their own benefit through an agent, must not know what is the habit of dealing between the broker and the underwriter; and whether the authority to settle must not mean that the broker should settle in the same way as is the custom to settle with underwriters With respect to the memorandum at the foot of the credit note, his Lordship thought that all which it imputed was this,—that inasmuch as the account had not then been adjusted by all the underwriters, the broker allowing the assured to draw for the whole amount of the loss in the meantime, did so without prejudice to their rights, in case the others should not pay or settle on account with them. The jury found their verdict for the defendant. A rule *nisi* having been obtained for a new trial, after the argument at the Bar, the Court took time to consider their judgment, which was afterwards delivered by Lord *Abinger*, C. B. His Lordship, *after detailing the facts of the case, said, "The Court has taken the whole argument into full consideration, and has come to the conclusion, that there was evidence of the settlement in account; that there was no misdirection upon the letter, the meaning of which, as part of a mercantile correspondence, was left to the judgment of a jury of merchants, nor was it material to the issue; and finally that even if the custom was not specifically proved as alleged, or if it was not proved that the plaintiffs had a precise knowledge of the custom as alleged, yet there was sufficient evidence of a custom between the brokers and underwriters, to make settlements in account, by taking credits as payments, and also of the knowledge of the plaintiffs of such a custom, and of their authorizing the brokers to settle with the underwriters, and to give them, the plaintiffs, credit on account for the loss, and to permit them to draw on the brokers for the amount." His Lordship then went on to say, that by this decision the Court must not be considered as overruling any case deciding that where an agent is employed by his principal to receive money, and pay it over to him, the agent does not thereby acquire any authority to pay a demand of his own upon the debtor, by a set-off in account with him, and concluded by laying down the general rule in the terms I have adopted at the commencement of this inquiry. (*a*)

[*567]

In the case of *Gibson* v. *Winter*, (*b*) (which was decided before the case of *Stewart* v. *Aberdein*) in which a broker in whose name a policy of insurance under seal was made, brought an action of covenant, and the defendants pleaded payment to the plaintiff according to the term and effect of the policy, and the proof was, that after the loss happened, the assurers paid the amount to the broker by allowing him credit for premiums due from him to them, it was held, that although this was no payment as between the assured and the assurers, it was a good payment as between the plaintiff on the record and the defendants; for a trustee suing as a *plaintiff in a Court of Law, must be treated in all respects as a party to the cause, and any defence against him is a defence against the *cestui que trust* who uses his name. But the principle of law, whereby the setting off a debt from the broker to the underwriter has been, under the above-mentioned circumstances, held to operate as a payment to the assured by the underwriter, is altogether dependent on the circumstance of the broker being agent to the assured, as well as to the underwriter. And, therefore, in the case of *Acey* v. *Fernie*, (*c*) on a policy of assurance on a life, when the premium became due on the 15th day of *March*, but was not paid

[*568]

(*a*) See pag 558.
(*b*) 5 B. & Ad. 96.
(*c*) 7 M. & W. 151.

until the 12th of *April*, when the country agent of the insurance company gave a receipt for the amount; and the instructions given by the company to the agent were, "that the premium on every life policy must be received within fifteen days of the time of its becoming due; and if not paid within that time that he was to give immediate notice to the office of that fact, and in the event of his omitting to do so, that his account would be debited for the amount after the fifteen days had expired: and no notice was given to the company of the non-payment of the premium within the fifteen days, and it was, therefore, entered in the books of the company as paid on the 15th of *March*, and the agent was *debited* for the amount; it was held by the Court of Exchequer that the *debiting* the agent with the premium could not be considered as a payment to the company by the assured." Lord *Abinger*, C. B., said, "The Court concurs with me in thinking the verdict must be supported, and that this rule, therefore, cannot be granted. Sir *F. Pollock* says very truly, that at the trial I entertained an impression somewhat favourable to his view of the case; but that was at the time we were considering whether the agent of the company might not be made the agent of the assured; and in that view of the case, if it were understood that payment was to be made by the agent, and there was an [*569] agreement on his part *to advance the money, then it might be considered as a payment on the day when it became due; but there was no evidence to shew that the country agent of the company was the agent of the assured, and I was of opinion that he could not so be considered. It seems to me that the provision that he should be *debited* as if the premium was paid, was to operate as a penalty on him; but does not authorize third persons to take advantage of that which was a mere private arrangement between the company and their agent, for the purpose of insuring the due payment of all moneys which were to be received by him."

PART II.

[*570] *SECTION THE FIRST.

OF FRAUD IN POLICIES.

I HAVE endeavoured in the preceding pages of this Treatise, which make up Part I, to perform the task which I proposed in the introduction to this subject, to go through the policy, sentence by sentence, from the beginning; thinking that to be the best method of treating every part of the contract, as well as to render the reference to the respective principles which are laid down, more easy to the student and to the practical lawyer; the first part contains the contract itself, which exists between the assured and the assurer; and we might have stopped here, if *bona fides* and propriety and regularity of acting between the parties, to this or to any contract, were always to be found. Unfortunately the law in most cases relating to express or implied contracts or the parts of the contracts has more than one object to keep in view, not only to explain clearly what is in fact the real state of the contract between the parties; but it has likewise to point out in what cases, and for what causes the policy is void, either from some impropriety or negligence on the part of either or both of the parties, and in some, it is needless to disguise it, the wickedness and the fraud, also, either of the one, or of both.

To leave these general observations, and to come at once to the contract that forms the subject of our present inquiry. These imperfections in the transactions of life between man and man, will in this instance, lead us naturally to inquire in what cases the assurer may be relieved and discharged from his responsibility; either on account of the contract being *void by law, from its commencement, if, I mean, it is illegal, the assured [*571] cannot recover according to the terms of it, and the assurer must generally give up the benefit which he expected. The late Mr. J. *Park* commences this part of his subject with some very sensible and suitable remarks, it is on his commencing his chapter upon "Fraud in Policies," (*a*) he says, "in treating of those causes which make policies void from the beginning, or in other words, which absolutely annul the contract, it will be proper, in the first place, to consider how far it will be affected by any degree of fraud. In every contract betwixt man and man, openness and sincerity are indispensably necessary to give it its due operation; because fraud and cunning once introduced, suspicion soon follows, and all confidence and good faith are at an end. No contract can be good, unless it be equal; that is, neither side must have an advantage by any thing of which the other is not aware. This being admitted of contracts in general, it holds with double force in those of insurance; because the underwriter computes his risk entirely from the account given by the person assured, and therefore, it is absolutely necessary to the justice and validity of the contract, that this account be exact and complete. Accordingly, the learned Judges of our Courts of Law, feeling that the very essence of insurance consists in a rigid attention to the purest good faith and the strictest integrity, have constantly held it is vacated and annulled by any the least shadow of fraud or undue concealment." And the learned author finishes these admirable observations by quoting authority for them from distinguished writers and jurists as well as laws. (*b*) One plain illustration of these principles is this, if the contingent event has happened at the time of the execution of the policy, to the knowledge of one party only, the policy is void on the ground of fraud. If the loss of a vessel has happened at the *time of the execution of [*572] the policy to the knowledge of the assured, or if the underwriter knows at the time of his subscribing the policy of the safe arrival of the vessel, it is clear, that in both of these cases the policy would be void on the ground of fraud. In the case of *Mead* v. *Davison*, (*a*) Lord *Denman* says, "the case of the Earl of *March* v. *Pigot*, (*b*) is a direct authority in principle in favour of the right to recover, if the loss was known to neither party at the time of making the insurance. According to the same case, and indeed on the plainest general principles, if the loss had been known to the assured alone the policy would have been void."

There appears to be three distinct cases, in which the policy may be rendered void by the assured or his agent: and as an agent is nearly always employed by the assured in this contract, the rules respecting agents will apply here, where the agent makes himself personally liable, but if he only acts on the false instructions received from the assured, the latter will of course have to suffer: but the rule will serve to apply to either.

The 1st is, "Where he has made some statement which he knew to be false." (*c*)

(*a*) Park Ins., vol. i. chap. x. page 403.

(*b*) 4 Black. Com. 460; Grot. de jure belli, lib. 2, c. 12, s. 23; Puff. de jure nat. lib. 5, c. 9, s. 8; Bynk. quest. jur. p. iv. lib. 4, c. 26; Ord. de Iou. 14, s. 38; 1 Black. 594; 3 Burr. 1905; Carter v. Boehm.

(*a*) 3 A. & E. 303. (*b*) 5 Burr. 2802.

(*c*) See Polhill v. Walter, 3 B. & Ad. 114.

The 2nd is, "Where he has stated something as true which he did not know to be true, omitting, at the same time, to give such information to the other contracting party, as would enable him to judge equally with himself, as to the nature and description of the risk he proposes to him to take. (*d*)

Mr. J. *Park* in his division of the cases on this subject, mentions a third instance, though he admits that it comes under the first head of the "allegatio falsi:" because, wherever a person knowingly and wilfully misrepresents anything, he asserts a falsehood. But he says in this contract, "he thought it was [*573] necessary, because, if a material circumstance *be misrepresented, though by a mistake, the contract is void as much as if there has been actual fraud, for the underwriter has computed his risk upon information which was false." And for this reason he makes

A 3d, which is "a misrepresentation of a material fact." (*a*)

We will, therefore, now proceed to mention the cases which have occurred under these respective heads in their order. And, firstly, we will mention those cases which come under the first head, viz: "where the assured or his agent makes a statement which he knew to be false."

In a case before Lord Chief Justice *Holt*, in the reign of *William* and *Mary*, that learned Judge held, that if the goods were insured as the goods of an *Hamburgher*, who was an ally, and the goods were, in fact, the goods of a *Frenchman*, who was an enemy, it was a fraud, and that the insurance was not good. (*b*)

In another case, of *Roberts* v. *Fonnereau*, (*c*) a letter being received, stating that a ship sailed from *Jamaica* for *London*, on the 24th of *November*, after which an insurance was made, and the agent told the insurer that the ship sailed the latter end of *December*, this was also held by Lord Chief Justice *Lee* to be a fraud, and the defendant had a verdict upon this point.

Upon a special case reserved for the opinion of the Court, in the case of *Woolmer* v. *Muilman*, (*d*) the following circumstances appeared:

It was an action on case, brought for the recovery of a total loss, on a policy of insurance made on goods and merchandises on board the ship *Bona Fortuna*, at and from *North Bergen* to any ports or places whatsoever, until her safe arrival in *London*. It was underwritten thus: "Warranted neutral ship and property." The defendant underwrote the policy for 150*l*. The defendant pleaded the general issue, and paid into Court the premium received by him [*574] *for the said insurance. This cause came on to be tried at *Guildhall* before Lord *Mansfield;* when it was admitted, that the plaintiff had interest on board the ship to a large value, to the amount of the sum insured. The ship with the goods and merchandises so laden, and being on board her, after her departure from *North Bergen*, and before her arrival in *London*, proceeding on her voyage, was, by the force of winds and stormy weather, wrecked, cast away, and sunk in the seas; and the said goods and merchandises were thereby wholly lost. It was expressly stated, "that the ship or vessel, called the *Bona Fortuna*, and the property on board, at and before the time she was lost, were not neutral property, as warranted by the said policy."

Lord *Mansfield*, and the rest of the Court, were of opinion, that it was too clear a case to bear an argument. This was *no contract;* for there was a falsehood, in respect of the condition of the thing insured: because the plaintiff insured neutral property, and this was not neutral property.

(*d*) See Smout v. Ilbery, 10 M. & W. 1. (*a*) See Park Ins. p. 404.
(*b*) Skin. 327.
(*c*) Sitt. at Guildhall after Trin. 1742; Park Ins. 405.
(*d*) 3 Burr. 1419; 1 W. Black. 427.

After the case of *Woolmer* against *Muilman* had been decided, another very similar case of *Fernandez* v. *Da Costa*, (*a*) came on at *Guildhall* before Lord *Mansfield*.

It was an action on a policy of insurance on goods laden on board such a ship, warranted a *Portuguese*. The insurance was made during the *French* war, when the premium would have been much higher on an *English* ship. The plaintiff gave partial evidence of her being a *Portuguese;* and that she was obliged, on account of the perils of the sea, to put into a *French* port, by which the cargo was spoiled. This was admitted by the defendant, who contended that during her stay at the *French* port, she was libelled, and condemned as not being *Portuguese;* and that although the goods were lost by a different peril, yet in fact the ship was not *Portuguese*, (being insured as such,) and that this vitiated the policy *ab initio*—and this was agreed to be law. In order to prove that she was not *Portuguese*, the defendant produced the [*575] *sentence of condemnation, and the confirmation thereof in the courts of *France;* and an answer of the present plaintiff in the Court of Chancery here, by which it was admitted, that the ship was condemned as not being, or under pretence of not being, *Portuguese*.

Lord *Mansfield*.—"As the sentence is always general, (without expressing the reason of the condemnation,) attested copies of the libel ought in strictness to have been produced, to shew upon what ground the ship was libelled against. But as the plaintiff has, by his answer in Chancery, admitted that she was condemned as not being *Portuguese;* when, added to the expression used in the sentence of confirmation, that the ship was condemned in the Court of Prizes, there is sufficient evidence for us to proceed upon." The defendant, the underwriter, had a verdict.

In a case in the House of Lords, of *Sibbald* v. *Hill*, (*b*) where a *London* merchant insuring at *Leith*, represented, contrary to the fact, that he had insured the same voyage at *Lloyd's* at the same premium offered to the *Leith* underwriters; who accordingly subscribed the policy, confiding in the skill and judgment of the *London* underwriters: it was held that this misrepresentation avoided the policy, though it was not such as affected the nature of the risk. Lord *Eldon* said, "that it appeared to him settled that, if a person meaning to make an insurance, exhibited a policy, underwritten by a person of skill and judgment, knowing that this would weigh with the other party, and disarm the ordinary prudence exercised in the common transactions of life; and it turned out that, in fact, this person had not underwritten the policy, or had done so under such terms that he became under no obligation to pay; this would vitiate the policy. The Courts in this country would say that this was a fraud, not on the ground that the misrepresentation affected the risk, but because it induced a confidence, without which the party would not have acted."

Secondly, the next instance in which fraud will vacate the policy, [*576] *is "where the assured or his agent, states something to be true which he does not know to be true; and at the same time omitting to give such information to the other contracting party, as would enable him to judge equally with himself as to the risk which he proposes for him to take.

Lord *Abinger*, in the case of *Cornfoot* v. *Fowke*, (*c*) says "in the case of *Hodgson* v. *Richardson*, (*d*) *Yates*, J., lays it down as a general proposition that, 'the concealment of material circumstances vitiates all contracts upon the principle of natural law.'" If this be true, can it be doubted the false representation of a material circumstance also vitiates a contract? These principles

(*a*) Sit. aft. Hil. 4 Geo. 3; Park Ins. 407. (*b*) 2 Dow. 263.
(*c*) 6 M. & W. 378. (*d*) 1 W. Black. 465.

are familiar to every person conversant with the law of insurance. But a policy of insurance is a contract, and is to be governed by the same principles as govern other contracts. When it is said to be a contract "*uberimæ fidei*," this only means that the good faith, which is the basis of all contracts, is more especially required in that species of contract, in which one of the parties is necessarily less acquainted with the details of the subject of the contract than the other. Now, nothing is more certain than that the concealment, or misrepresentation, whether by principal or by agent, by design or by mistake, of a material fact, however innocently made, avoids the contract on the ground of a legal fraud." And a little further in his judgment, he says that "in the case of *Pawson* v. *Watson*, (*c*) Lord *Mansfield* lays it down generally, "that in a representation to induce a party to make a contract, it is equally false for a man to affirm that of which he knows nothing, as it is to affirm that to be true which he knows to be false." This maxim is neither negatived nor qualified by the doctrine laid down in that class of cases derived from *Pasley* v. *Freeman*. (*d*) The plaintiffs in those cases sought to charge a party with damages for stating [*577] that which he believed to be *true, though he did not know it to be so." His Lordship then alluding to the case before him, continued:—"whether his concealment was consistent with good faith and free from moral turpitude, may be determined by a reference to the case put by *Cicero*, in the third book of his *Treatise de Officiis*, which I the rather mention, because the sale of the house he puts, hypothetically, by way of example, was liable to an objection that bears some analogy to the present. (*a*)

"Vendat ædes vir bonus propter aliqua vitia quæ ipse norit cæteri ignorent: pestilentes sint, et habeantur salubres; ignoretur in omnibus cubiculis apparere serpentes; male materiatæ, ruinosæ: sed hoc præter dominum nemo sciat: quæro, si hoc emptoribus venditor non dixerit, ædesque vendiderit pluris multo, quam se venditurum putarit, num id injustè an improbe fecerit?" He then gives the argument on both sides, and concludes that the vendor ought not to have concealed these defects in the house from the buyer. "Neque enim id est celare, quicquid reticeas: sed cum, quod tu scias, id ignorare emolumenti tui causâ, velis eos, quorum intersit id scire." Then this illustrious moralist gives his own opinion of the moral turpitude of such a concealment; for he says:—"Hoc autem celandi genus quale sit, et cujus hominis, quis non videt? Certe non aperti, non simplicis, non ingenui, non justi, non boni viri; versuti potius obscuri, astuti, fallacis, malitiosi, callidi, veteratoris, vafri." Now the present is a case in which the fraudulent concealment of a material fact by the principal, and the false representation of the agent, combine to constitute a degree of fraud, even morally speaking, to sustain the defendant's plea, that he was induced by fraud, covin, and false representation to sign the contract."

Let us now proceed to refer to the reported cases on this head.

Where in the case of *Da Costa* v. *Scandret*, (*b*) one having a doubtful [*578] account of his ship, that was at sea, namely, that *a ship, described like his, was taken, insured her, without giving any notice to the insurers of what he had heard either as to the hazard, or the circumstances, which might induce him to believe that his ship was in great danger, if not actually lost. The insurers bring a bill for an injunction, and to be relieved against the insurance as fraudulent.

Lord Chancellor *Macclesfield*.—"The insured has not dealt fairly with the insurers in this case: he ought to have disclosed to them what intelligence he,

(*c*) Cowper, 785. (*d*) 3 T. R. 51.

(*a*) In Cornfoot v. Fowke, "the adjoining house to the one the subject of action was a notorious brothel." (*b*) In Chancery, 2 P. Wms. 170.

had of the ship's being in danger, and which might induce him, at least, to fear that it was lost, though he had no certain account of it. For if this circumstance had been discovered, it is impossible to think, that the insurers would have insured the ship at so small a premium as they have done; but either would not have insured at all, or would have insisted on a larger premium, so that the concealment of this intelligence is a fraud." Whereupon the policy was decreed to be delivered up with costs, but the premium to be paid back, and allowed out of the costs.

In another case of *Seaman* v. *Fonnereau*, (*d*) it appeared, that on the 25th of *August*, 1740, the defendant underwrote a policy from *Carolina* to *Holland*. It came out in evidence, that the agent for the plaintiff had, on the 23rd of *August*, (two days before the insurance was made,) received a letter from *Cowes*, dated the 21st of *August*, wherein it is said:—"On the 12th of this month, I was in company with the ship *Davy* (the ship in question;) at twelve at night lost sight of her all at once; the captain spoke to me the day before that he was leaky, and the next day we had a hard gale." The ship, however, continued her voyage till the 19th of *August*, when she was taken by the *Spaniards;* and there was no pretence of any knowledge of the actual loss at the time of the insurance, but it was made in consequence of a letter received that day from the plaintiff abroad, dated the 27th *June* before.

*Lord Chief Justice *Lee* declared, "that as these are contracts upon chance, each party ought to know all the circumstances. [*579] And he thought it not material, that the loss was not such an one as the letter imported; for those things are to be considered in the situation of them at the time of the contract, and not to be judged of by subsequent events. He therefore thought it a strong case for the defendant." The jury found accordingly. (*a*)

2. But it was held in the case of *Foley* v. *Moline*, (*b*) the time of the ship's sailing is not always material to be communicated, unless the ship be a missing ship. Or unless another ship which sailed after her has arrived first.

In the case of *Kirby* v. *Smith*, (*c*) where the owner of the ship *Ocean*, having sailed in another vessel from *Elsineur* to this country six hours after the *Ocean* had sailed for the same place, on the same voyage, had met with bad weather, and still arrived before the *Ocean*, and then caused an insurance to be made on that ship on a voyage from *Elsineur* to *Hull:* it was held that the broker's stating that the *Ocean* was all well at *Elsineur* on the day on which she sailed without communicating the above facts, was a material concealment, and that the policy was void.

And in another case, *Westbury* v. *Aberdein*, (*d*) where a policy of insurance was made upon the ship *King George*, "at and from *Malaga* to *London*, warranted to sail on the 10th *October*," and the assured communicated to the underwriters that the *King George* and another vessel, called the *Fruiter*, both sailed from *Malaga* on the 10th *October*, and the underwriters knew, from the entries at *Lloyd's*, that the *Fruiter* had arrived at *London* some days before: but the *assured also knew that the captain of the *Fruiter* had seen the *King George* off *Oporto* on 21st *October*, when they had [*580] parted company by reason of a gale coming on, and did not communicate this

---

(*d*) 2 Stra. 1183.

(*a*) See also Webster v. Forster, 1 Esp. 407. Willis v. Glover, 1 N. R. 14.

(*b*) 1 Marsh. 117. See also Fort v. Lee, 3 Taunt. 381. Berthton v. Loughman, 2 Stark. 58.

(*c*) 1 B. & A. 672. But it is not necessary to communicate the arrival of another vessel when that circumstance is mentioned in Lloyd's printed list. Friese v. Woodhouse, 1 Holt, 572; and see Elton v. Larkins, 3 Bing. 198.

(*d*) 2 M. & W. 267.

fact to the underwriters: the *Fruiter* arrived on the 30th *October*, and the insurance was made on the 3rd *November*, the Court of Exchequer considered that the fact of the two vessels being in safety together on the 21st, and one of them having arrived five days without the other, was a circumstance material to be communicated to the underwriters, and as this question had not been properly submitted to the jury, they granted a new trial, upon payment of costs.

So in the cases of *Lynch* v. *Hamilton*, (*a*) and *Lynch* v. *Durnsford*, (*b*) where goods were insured "on board ship or ships" from the *Canary* islands to *London:* it appeared that the agent of the assured, when he made the insurance on the 26th *November*, knew that one of the ships upon which part of the goods were laden was called the *President;* and at that time a paper was stuck up at *Lloyd's*, stating that "the *Howard* had arrived off *Dover* from *Teneriffe;* sailed the 24th; on the 27th, off the *Salvages*, fell in with the *President*, Owens, from *Lauzarette*, deep and leaky:" but the agent did not inform the underwriters that part of the goods of the assured were on board the *President*, (it did not appear by whom the paper at *Lloyd's* had been put up) but the report turned out to be unfounded. The Court held, that the agent ought to have communicated his knowledge of the name of the ship, which, being compared with the report at *Lloyd's*, was material at the time, although that report turned out to be untrue, and his having omitted to do so, the policy was thereby avoided. (*c*)

[*581] *In an action on a policy of insurance, in the case of *Hodgson* v. *Richardson*, (*a*) the ship was insured at and from *Genoa*, liable to average; her loading consisting of potash, verdigrease, cotton, and other perishable commodities. This loading was put on board at *Leghorn* the 10th *August*, and the vessel had lain at *Genoa* about five months, been originally bound for *Dublin;* but losing her convoy, she put into *Genoa* the 13th of *August*, and lay there till the 5th of *January*, when she sailed. And the insurance was made the 20th of *January;* at which time these circumstances were known to the assured, but not communicated to the underwriter. A few days after she put to sea, she was shattered by a storm, and the cargo considerably damaged. The jury found a verdict for the plaintiff; and a new trial was moved for on this ground, that the policy was bad *ab initio*, for want of a due disclosure of the circumstances.

Lord *Mansfield.*—"The question is, whether here was a sufficient disclosure; that is, whether the fact concealed was material to the risk run. This is a matter of fact, and if material the consequence is matter of law, that the policy is bad. Now who can say, that no risk was run, during the five months' stay at *Genoa*, or no damage happened in that period? The policy is founded on misrepresentation: the ship is insured "at and from *Genoa*, to *Dublin;* the adventure to begin from the loading, to equip for this voyage." This plainly implies, that *Genoa* was the port of loading: and at the trial, all the witnesses said, that by usage, it was material to acquaint the underwriter, whether the insurance was to be at the commencement or in the middle of a voyage." The rest of the Court concurred, and a new trial was accordingly granted.

[*582] An action in the case of *Ratcliffe and another* v. *Shoolbred*, (*b*) was brought on a policy of insurance on goods on board the *Matty* and *Betty*, at and from the coast of *Africa*, *to her last discharging port in

---

(*a*) 3 Taunt. 37. (*b*) 14 East, 494.

(*c*) It may be doubted whether the assured can in any case effect an insurance upon "ship or ships," without naming them, if he be acquainted with their names? It would seem, at any rate, that if the underwriter requires the name, the assured is bound to communicate it, if he knows it. 3 Taunt. 39. (*a*) 1 Black. 463; *ante*, p. 576.

(*b*) Sitt. at Guildhall after Trin. 1780. Park Ins. 413.

the *British West Indies*. The objection made to paying the loss was, that there had been a material concealment or misrepresentation of the true state or situation of the ship and voyage at the time of underwriting the policy. The ship had been sent out to trade on the coast of *Africa*, with directions to proceed from thence to the *British West Indies* and to stop at *Barbadoes*, if she could get a sale: if not, to proceed to *Montego Bay*. On the 2nd of *October* she sailed from *St. Thomas's* on the coast of *Africa*, with a cargo of slaves, and was taken on the 6th of *December* following by an *American* privateer. A letter was received by a house at *Liverpool* on the 21st of *February*, mentioning that the ship was well, and had sailed from *St. Thomas's* on the 2nd of *October*. This information was communicated next day to the plaintiffs, who, in consequence of it, wrote the same evening to two different brokers, to get a new insurance on the ship, there having been one before, and another on the cargo, which last was the subject of the present action. In the instructions to the brokers, the plaintiffs say nothing of the ship from the time of her first sailing; but to one of the brokers they wrote thus:—"We should be glad if you would get us 600*l.* more on the ship, as she is rather long; and we think it not prudent to run so large a risk at so critical a time. We expect to hear soon of her." It had afterwards occurred that the insurance might be made, if intimation was not given of the letter which had been received. The broker, therefore, by direction of the plaintiffs added to the instructions:—"The above ship was on the coast the 2nd of *October;*" but said nothing of her having sailed from *St. Thomas's*. The policy was dated the 21st of *March*.

Lord *Mansfield*.—"The insured is bound to represent to the underwriter all the material circumstances of the ship and voyage. If he do not, though by accident only, or neglect, the underwriters are not liable; *à fortiori*, if he suppress or misrepresent from fraud. The question is, whether this be one of those cases which is affected by misrepresentation or *concealment? If the plaintiffs concealed any material part of the information they [*583] received, it is a fraud; and the insurers are not liable." The jury found for the defendant agreeably to his Lordship's direction.

So in *M'Andrews* v. *Bell*, (*a*) the underwriter had a verdict, where the assured had, on the 24th of *November*, received a letter from *Lisbon*, dated the 8th, stating the ship to be then ready to sail, and did not make the insurance till the 2nd of *December*, and did not then communicate the letter.

In another case, *Fillis* v. *Brutton*, (*b*) the policy was on the brig *Richard*, at and from *Plymouth* to *Bristol*. Several letters passed between the plaintiff and the broker who made the insurance as to the premium at which the insurance could be made: at last it was underwritten four guineas per cent. The broker's instructions stated the ship ready to sail on the 24th of *December*. The broker represented to the underwriter that the ship was in port, when in fact she had sailed the 23rd of *December*.

Lord *Mansfield* said "that this was a material concealment and misrepresentation." The jury, however, hesitated: his Lordship then laid down the following as general principles:—"In all insurances, it is essential to the contract that the assured should represent the true state of the ship, to the best of his knowledge. On that information the underwriters engage. If he states that as a fact which he does not know to be true, but only believes it, it is the same as a warranty. He is bound to tell the underwriters truth. In the present insurance, the only material point is this—Had the ship sailed, or was she in port?" Upon this the jury found for the defendant. (*c*)

(*a*) 1 Esp. 373.
(*b*) Sitt. at Guildhall, after Hil. Term. 1782. Park Ins. 414.
(*c*) See Chausand v. Angerstein, Peake, 43.

And in a late case of *Rickards* v. *Murdock and another*, (*d*) Lord *Tenterden* held, that where a material part of a letter *had been suppressed [*584] by the agent who made the policy, evidence of underwriters was admissible to prove that, in their opinion, the part concealed was material, and affected the risk. The facts were the following:—A merchant, residing at *Sidney*, shipped goods for *England*, on board the ship *Cumberland*, and by another ship, that sailed more than a month after her, wrote to his agent in *England*, and desired him, if he received that letter before the *Cumberland* arrived, to wait for thirty days, in order to give every chance for her arrival, and then make an insurance on the goods. The letter was received, and the agent, after waiting more than thirty days, employed a broker to make an insurance, and handed the letter to him. The broker told the underwriters when the *Cumberland* sailed, and when the letter ordering the insurance was written; but he did not state when it was received, nor the order to wait thirty days after the receipt of it before the insurance was made. The *Cumberland* never arrived. At the trial, Lord *Tenterden* admitted the evidence of several underwriters, who deposed that, in their opinion, the whole of the letter ought to have been communicated, and that the part omitted was material. The jury found for the defendants; and, upon a motion for a new trial, the Court held, that the evidence of the underwriters' opinion was properly received at the trial, and that, without that evidence, the jury would have been bound to have found that the part of the letter not communicated to the underwriters was material; and that, consequently, the policy was void.

There is a very recent case of *M'Intosh* v. *Marshall*. (*a*) The plaintiff was owner of the ship *Elizabeth*, sailing from *St. John's*, *Newfoundland*, to *Liverpool*. Dwyer was his correspondent there. In *December*, 1841, the *Elizabeth* was at *St. John's*, with cod-oil and blubber on board, to the value of 500*l*. Plaintiff received a letter, on *January* 14th, from Dwyer, dated *December* 24th, and had come, by steamer, *from *Halifax*, stating [*585] that the *Elizabeth* was to sail *December* 25th, that the plaintiff might give her four or five days, if the weather was favourable. A similar letter came by the *Amelia*, which sailed from *St. John's*, *December* 30th, for *Cork*, and arrived there *January* 19th, 1842; the letter passed through the *Dublin* post-office on the 20th, and would be due in *Liverpool* on the 21st. At the trial, the letter was produced, indorsed, "Received the 24th *January*." In it there was a direction, "You can allow her sixteen to twenty days. You can run a reasonable risk to save insurance." It appeared the vessel actually sailed on *December* 27th; but of this it did not appear the plaintiff had been advised directly. A Mr. Outerson had, however, informed plaintiff, on *'Change*, that he had letters from his correspondent at *St. John's*, down to the 27th, and he had heard nothing of the *Elizabeth's* sailing. Nothing was done towards insuring till 26th *January*, 1842, when instructions were sent to *London* to insure, stating he had had advices from *Newfoundland* to 27th *December*, 1841; that the *Elizabeth* was to sail about the end of the month; that she was a new ship, and the insurance was to be done at the lowest rate of the day. With these instructions the agent went to *Lloyd's*, and saw defendant. In the course of his interview, he called his attention to a *St. John's* shipping list, which professed to be a duplicate, *per Amelia*, "*viâ Cork*," the original having been sent by the *Elizabeth*, "*viâ Liverpool*." In this very list it was stated that the *Elizabeth* sailed on the 27th *December*, 1841; but it did not appear that the defendant noticed this fact.

(*d*) 10 B. & C. 527. But see the observations on the admission of the evidence in this case in Campbell v. Rickards, 5 B. & Ad. 847; *ante*, p. 538.

(*a*) Tried by Mr. B. Maule, at Liverpool Summer Assizes, 1842. MS. *penes me*.

It was contended for the defendant, that the letters saying the *Elizabeth* would sail about the 25th *December* should have been communicated, as varying the risk; and that the statement of there being advices to the 27th was not justified by the informant of Mr. Outerson, that he had not heard of her sailing. Verdict for the plaintiff. (*a*)

*In the case of *Carter* v. *Boehm*, (*b*) which was an insurance cause upon a policy, interest or no interest, without benefit of salvage. The insurance was made by the plaintiff for the benefit of his brother, governor George Carter. The jury found a verdict for the plaintiff; upon which a new trial was moved for, on the ground that circumstances had not been sufficiently disclosed. Lord *Mansfield* reported the evidence given at the trial; by which it appeared that it was a policy of insurance for one year, namely, from the 16th of *October*, 1759, to the 16th of *October*, 1760, for the benefit of the governor of *Fort Marlborough*, George Carter, against the loss of *Fort Marlborough*, in the island of *Sumatra*, in the *East Indies*, by its being taken by a foreign enemy. The event happened. The fort was taken by Count D'Estaigne, within the year. The first witness was Cawthorne, the broker, who produced the memorandum given by the governor's brother (the plaintiff) to him; and the use made of these instructions was to show that the insurance was made for the benefit of governor Carter, and to insure him against the taking of the fort by a foreign enemy. Both parties had been long in Chancery, and the depositions there made on both sides were read as evidence upon this trial. It was objected, on behalf of the defendant, to be a fraud, by concealment of circumstances which ought to have been disclosed; and particularly the weakness of the fort, and the probability of its being attacked by the *French;* which concealment was offered to be proved by two letters. The first was a letter from the governor to his brother, Roger Carter, his trustee, and the plaintiff in this cause; the second was from the governor to the *East India Company.* [*586]

The evidence in reply to this objection, consisted of three depositions in Chancery; setting forth, that the governor had 20,000*l.* in effects; and had only insured 10,000*l.* : and that he was guilty of no fault in defending the fort. The first of these depositions was Captain *Tryon's*, which proved, that *this was not a fort proper or designed to resist *European* enemies; but only calculated for defence against the natives of the island of *Sumatra;* that the governor's office is not military, but only mercantile: and that *Fort Marlborough* is only a subordinate factory to *Fort St. George.* There was no evidence to the contrary; and a special jury found a verdict for the plaintiff. [*587]

After argument at the Bar, upon the motion for a new trial, and time taken by the Court to deliberate, their unanimous opinion was delivered by

Lord *Mansfield*—"This is a motion for a new trial. In support of it the counsel for the defendant contend, that some circumstances in the knowledge of governor Carter, not having been mentioned at the time the policy was underwritten, amount to a concealment, which ought, in law, to avoid the policy. The counsel for the plaintiff insist, that the not mentioning these particulars does not amount to a concealment, which ought, in law, to avoid the policy; either as a fraud, or as varying the contract. 1st, It may be proper to say something in general of concealments which avoid a policy. 2ndly, To state particularly the case now under consideration. 3rdly, To examine whether

(*a*) This case is not any where reported, and therefore it is to be supposed that no motion was made to the Court.

(*b*) 2 Burr. 1905; 1 Black. R. 593.

the verdict which finds this policy good, although the particulars objected were not mentioned, is well founded.

"First. Insurance is a contract upon speculation. The special facts, upon which the risk is to be computed, lie most commonly in the knowledge of the insured only. The underwriter trusts to his statement, and proceeds upon confidence, that he does not keep back any circumstances within his knowledge, to mislead the underwriter into a belief that the circumstances do not exist, and to induce him to estimate the risk, as if they did not exist. The keeping back such circumstances is a fraud; and therefore, the policy is void. Although the suppression should happen through mistake, without any fraudulent intention; yet still the underwriter is deceived, and the policy is void: because the risk run is really different from the risk understood, and intended to be run at
[*588] the time *of the agreement. The policy would equally be void against the underwriter, if he concealed anything; as if he insured a ship on her voyage, which he privately knew to be arrived: and an action would lie to recover the premium. The governing principle is applicable to all contracts and dealings. Good faith forbids either party, by concealing what he privately knows, to draw the other into a bargain, from his ignorance of that fact, and his believing the contrary. But either party may be innocently silent as to grounds open to both, to exercise their judgment upon. *Aliud est celare; aliud tacere: neque enim id est celare quicquid reticeas; sed cum quod tu scias, id ignorare, emolumenti tui causâ, velis eos, quorum intersit id scire.* (*a*) This definition of concealment, restrained to the efficient motives, and precise subject of any contract, will generally hold to make it void, in favour of the party misled by his ignorance of the thing concealed. There are many matters, as to which the insured may be innocently silent; he need not mention what the underwriter knows, *scientia utrinque par pares contrahentes facit.* An underwriter cannot insist that the policy is void, because the insured did not tell him what he actually knew, what way soever he came to the knowledge. The insured need not mention what the underwriter ought to know; what he takes upon himself the knowledge of; or what he waives being informed of. The underwriter need not be told what lessens the risk agreed, and understood to be run by the express terms of the policy. He need not be told general topics of speculation: as for instance, the underwriter is bound to know every cause which may occasion natural perils, as the difficulty of the voyage, the kind of seasons, the probability of lightning, hurricanes, and earthquakes. He is bound to know every cause which may occasion political perils, from the rupture of states, from war, and the various operations of war. He is bound to know the probability of safety, from the continuance and return of peace, from the imbecility of the enemy, through the weakness of their councils, or
[*589] their want of *strength." If an underwriter insure private ships of war, by sea, and on shore from ports to ports, and from places to places, any where, he need not be told the secret enterprises upon which they are destined, because he knows some expedition must be in view: and from the nature of his contract, he waives the information, without being told. If he insure for three years, he need not be told any circumstance to shew it may be over in two; or, if he insure a voyage with liberty of deviation, he need not be told what tends to shew there will be no deviation. Men argue differently, from natural phenomena, and political appearances; they have different capacities, different degrees of knowledge, and different intelligence. But the means of information and judging are open to both: each professes to act from his own skill and sagacity, and therefore neither need to communicate

(*a*) Cicero de Offiiciis, lib. 3, c. 12, 13; see *ante*, p. 577.

to the other. The reason of the rule, which obliges the parties to disclose, is to prevent fraud, and encourage good faith, it is adapted to such facts as vary the nature of the contract, which one privately knows, and the other is ignorant of, and has no reason to suspect. The question, therefore, must always be, "whether there was, under all the circumstances, at the time the policy was underwritten, a fair statement, or a concealment: fraudulent, if designed, or, though not designed, varying materially the object of the policy, and changing the risk understood to be run." (*a*)

"2ndly. This brings me, in the second place, to state the case now under consideration. The policy is against the loss of *Fort Marlborough*, from being destroyed by, taken by, or *surrendered unto any *European* [*590] enemy, between the 16th of *October*, 1759, and the 16th of *October*, 1760. The underwriter knew at the time that the policy was to indemnify, to that amount, George Carter, the governor of *Fort Marlborough*, in case the event insured against should happen. The governor's instructions for the insurance, bearing date at *Fort Marlborough*, the 22nd of *September*, 1759, were laid before the underwriter. Two actions upon this policy were tried before me in the year 1762. The defendants then knew of a letter written to the *East India Company*, which the company offered to put into my hands, but would not deliver it to the parties, because it contained some matters which they did not think proper to be made public. An objection occurred to me at the trial, whether a policy against the loss of *Fort Marlborough*, for the benefit of the governor, was good, upon the principle which does not allow a sailor to insure his wages. But considering that this place, though called a fort, was really but a factory, or settlement for trade, and that he, though called a governor, was really but a merchant, considering, too, that the law allows a captain of a ship to insure goods which he has on board, or his share in the ship, if he be a part-owner; and the captain of a privateer, if he be a part-owner, to insure his share: considering also, that the objection could not, upon any ground of justice, be made by the underwriter, who knew him to be governor at the time he took the premium; and, as with regard to principles of public convenience, the case so seldom happens, (I never saw one before,) any danger from the example is little to be apprehended: I did not think myself warranted, upon that point, to nonsuit the plaintiff; especially as the objection did not come from the Bar. Though this point was mentioned at the last trial, it was not insisted upon; nor has it been seriously argued, upon this motion, as sufficient alone to vacate the policy; and if it had, we are all of opinion that we are not warranted to say that it is void upon this account. Upon the plaintiff's obtaining the two former verdicts, the underwriters went into a Court of Equity, where they have *had an opportunity to sift everything to the [*591] bottom, to get every discovery from the governor and his brother, and to examine any witnesses that were upon the spot. At last, after the fullest investigation of every kind, the present action came on to be tried at the sittings after last Term. The plaintiff proved without contradiction, that the place called *Bencoolen* or *Fort Marlborough*, is a factory or settlement, but no military fort or fortress; that it was not established for a place of arms or defence

(*a*) Within this principle Lord Ellenborough was of opinion, that it was not necessary, where an insurance was made on the homeward voyage, to communicate a letter from the captain, stating the damages he had encountered on the outward voyage, and describing the ship as being then unseaworthy, and standing in need of a great many repairs, as governing the time when the ship would be able to sail; for if this were so, said his Lordship, it would be necessary in all cases to inform the underwriters when any repairs are wanting. Beckwith v. Sydebotham, 1 Camp. 116. And see also, *ante*, p. 133, the case of Shoolbred v. Nutt, and of Hayward v. Rogers, *ante*, p. 134, and Long v. Duff, 2 Bos. & Pull. 209.

against the attacks of an *European* enemy, but merely for the purpose of trade, and of defence against the natives; that the fort was only intended and built to keep off the country blacks; that the only security to *European* ships of war consisted in the difficulty of the entrance and navigation of the river, for want of proper pilots, that the general state and condition of the said fort, and of the strength thereof, were in general well known by most persons conversant or acquainted with *Indian* affairs, of the state of the Company's factories or settlements; and could not keep secret or concealed from persons who should endeavour, by proper inquiry, to inform themselves; that there were no apprehensions or intelligence of any attack by the *French;* until they attacked *Nattal*, in *February*, 1760; that on the 8th of *February*, 1760, there was no suspicion of any design by the *French;* that the governor at that time bought of the witness goods to the value of 4,000*l.*, and had goods to the value of above 20,000*l.*, and then dealt for 50,000*l.* and upwards; that on the 1st of *April*, 1760, the fort was attacked by a *French* man-of-war of sixty-four guns, and a frigate of twenty guns, under the Compte D'Estainge, brought in by *Dutch* pilots, was unavoidably taken, and afterwards delivered to the *Dutch*, the prisoners being sent to *Batavia*. On the part of the defendant, after all the opportunities of inquiry, no evidence was offered that the *French* ever had any design upon *Fort Marlborough* before the end of *March*, 1760, or that there was the least intelligence or alarm that they might make the attempt till the taking of *Nattal*, in the year 1760. They did not offer to disprove the evi-

[*592] dence that *the governor had acted, as in full security, long after the month of *September*, 1759, and had turned his money into goods so late as the 8th of *February*, 1760. There was no attempt to shew that he had not lost by the capture very considerably beyond the value of his insurance. But the defendant relied upon a letter written to the *East India Company*, bearing date the 16th of *September*, 1759, which was sent to *England* by the *Pitt*, Captain *Wilson*, who arrived in *May*, 1760, together with the instructions for insuring, and also a letter bearing date the 22nd of *September*, 1759, sent to the plaintiff by the same conveyance, and at the same time (which letters his Lordship repeated.) They relied, too, upon the cross-examination of the broker who negotiated the policy, that, in his opinion, these letters ought to have been produced, or the contents disclosed; and that if they had, the policy would not have been underwritten. The defendant's counsel contended at the trial, as they have done upon this motion, that the policy was void: 1st, Because the state and condition of the fort mentioned in the governor's letter to the *East India Company* was not disclosed. 2ndly, Because he did not disclose that the *French*, not being in a condition to relieve their friends upon the coast, were most likely to make an attack upon this settlement, rather than remain idle. 3rdly, That he had not disclosed his having received a letter of the 4th of *February*, 1759, from which it seemed that the *French* had a design to take this settlement by surprise the year before. They also contended, that the opinion of the broker was almost decisive. The whole was laid before the jury, who found for the plaintiff.

"Thirdly. It remains to consider these objections, and to examine whether this verdict is well founded. To this purpose, it is necessary to consider the nature of the contract at the time it was made. The policy was signed in *May*, 1760. The contingency was whether *Fort Marlborough* was or would be taken, by an *European* enemy between *October*, 1759, and *October*, 1760. The computation of the risk depended upon the chance, whether any *European*

[*593] power *would attack the place by sea. If they did, it was incapable of resistance. The underwriter at *London*, in *May*, 1760, could judge much better of the probability of the contingency than governor Carter could at *Fort Marlborough* in *September*, 1759. He knew the success

of the operations of the war in *Europe:* he knew what naval force the *English* and *French* had sent to the *East Indies.* He knew, from a comparison of that force, whether the sea was open to any such attempt by the *French.* He knew, or might know, every thing which was known at *Fort Marlborough* in *September*, 1759, of the general state of affairs in the *East Indies*, or the particular condition of *Fort Marlborough*, by the ship which brought the order for the insurance. He knew that ship must have brought many letters to the *East India Company*, and particularly from the governor. He knew what probability there was of the *Dutch* committing, or having committed, hostilities. Under these circumstances, and with this knowledge, he insures against the general contingency of the place being attacked by an *European* power. If there had been any design on foot, or enterprise begun in *September*, 1759, to the knowledge of the governor, it would have varied the risk understood by the underwriter, on account of his not being told of a particular design or attack then *subsisting;* and he estimated the risk upon the foot of an uncertain operation, which might or might not be attempted. But the governor had no notice of any design subsisting in *September*, 1759. There was no such design in fact: the attempt was made without premeditation, from the sudden opportunity of a favourable occasion, by the connivance and assistance of the *Dutch*, which tempted Compte D'Estaigne to break his parole. These being the circumstances under which the contract was entered into, we shall be better able to judge of the objections upon the foot of concealments. The first concealment is, that he did not disclose the condition of the place. The underwriter knew the insurance was for the governor. He knew the governor must be acquainted with the state of the place. He knew the governor could not disclose *it, consistently with his duty. He knew the governor, by insuring, apprehended, at least, the possibility of an attack. With [*594] this knowledge, without asking a question, he underwrote. (*a*) By so doing, he took the knowledge of the state of the place upon himself. It was a matter, as to which he might be informed various ways: it was not a matter within the private knowledge of the governor only. But not to rely upon that, the utmost which can be contended is, that the underwriter trusted to the fort being in the condition in which it ought to be: in like manner as it is taken for granted, that a ship insured is seaworthy. What is that condition? All the witnesses agree, that it was only to resist the natives, and not an *European* force. The policy insures against a total loss, taking for granted, that if the place was attacked, it would be lost. The contingency, therefore, which the underwriter has insured against, is, whether the place would be attacked by an *European* force; and not whether it would be able to resist such an attack, if the ships could get up the river. It was particulary left to the jury to consider, whether this was the contingency in the contemplation of the parties: they have found that it was. And we are all of opinion, that in this respect their conclusion is agreeable to the evidence. The state and condition of the place were material in this view only, in case of a land attack by the natives.

"The second concealment is, his not having disclosed that, from the *French* not being able to relieve their friends upon the coast, they might make them a visit. This is no part of the fact of the case; it is mere speculation of the governor, from the general state of the war. The conjecture was dictated to him from his fears. It is a bold attempt for the conquered to attack the conqueror in his own dominions. The practicability of it, in this case, depended upon the *English* naval forces in those seas, of which the underwriter could better judge at *London*, in *May*, 1760, than the *governor [*595] could at *Fort Marlborough*, in *September*, 1759. The third concealment is,

(*a*) See Accord. Vallance v. Dewar, 1 Camp. 503. *Ante*, p. 206.

that he did not disclose the letter from Mr. Winch of the 4th of *February*, 1759, mentioning the design of the *French* the year before. What that letter was; how he mentioned the design; or upon what authority he mentioned it; or by whom the design was supposed to be imagined, does not appear. The defendant has had every opportunity of discovery; and nothing has come out upon it, as to this letter, which he thinks makes for his purpose. The plaintiff offered to read the account Winch wrote the *East India Company*, which was objected to; and therefore, it was not read. The nature of that intelligence, therefore, is very doubtful. But taking it in the strongest light, it is the report of a design to surprise the year before; but then dropped. This is a topic of mere general speculation, which made no part of the fact of the case upon which the insurance was to be made. It was said, if a man insured a ship, knowing that two privateers were lying in her way, without mentioning that circumstance, it would be a fraud. I agree to it. But if he knew that two privateers had been there the year before, it would be no fraud, not to mention that circumstance: because it does not follow that they will cruise this year, at the same time, in the same place; or that they are in a condition to do it. If the circumstance of this design laid aside had been mentioned, it would have tended rather to lessen the risk, than increase it; for the design of a surprise, which has transpired, and been laid aside, is less likely to be taken up again; especially by a vanquished enemy. The jury considered the nature of the governor's silence as to these particulars; they thought it innocent, and that the omission to mention them did not vary the contract. And we are all of opinion, that, in this respect, they judged extremely right. There is a silence, not objected to at the trial, nor upon this motion; which might, with as much reason, have been objected to, as the two last omissions; rather more. It appears by the governor's letter to the plaintiff, that he was principally apprehensive of a *Dutch* war. He *certainly had, what he thought, good grounds for this apprehension. Compte D'Estaigne being piloted by the *Dutch*, delivering the fort to the *Dutch*, and sending the prisoners to *Batavia*, is a confirmation of those grounds. Probably the loss of the place was owing to the *Dutch*. The *French* could not have got up the river without *Dutch* pilots; and it is plain the whole was concerted with them. And yet, at the time of underwriting the policy, there was no intimation about the *Dutch*. The reason why the counsel have not objected to his not disclosing the grounds of this apprehension is, because it must have arisen from political speculation and general intelligence: therefore, they agree, it is not necessary to communicate such things to the underwriter.

[*596]

"Lastly. Great stress was laid upon the opinion of the broker. But we all think the jury ought not to pay the least regard to it: it is mere opinion, which is not evidence: it is opinion after an event: it is opinion without the least foundation from any previous precedent or usage: it is an opinion, which, if rightly formed, could only be drawn from the same premises, from which the Court and jury were to determine the cause: and therefore, it is improper and irrelevant in the mouth of a witness. (*a*) There is no imputation upon the

(*a*) See the case of Campbell v. Rickards, 5 B. & Ad. 846, *ante*, p. 538. And in Durrel v. Bedesly, Holt, 285, C. J. Gibbs says, "The opinion of underwriters on the materiality of facts and the effect they would have had upon the premium, is not admissible in evidence, Lord Mansfield and Lord Kenyon discountenanced this evidence of opinion; and I think it ought not to be received. It is the province of a jury and not of individual underwriters to decide what facts ought to be communicated. It is not a question of science, in which scientific men will mostly think alike, but a question of opinion, liable to be governed by fancy and in which the diversity might be endless. Such evidence leads to nothing satisfactory, and ought on that ground to be rejected." But see Chapman v. Walton, 10 Bing. 57, and Rickards v. Murdock, 10 B. & C. 527, *ante*, p. 539.

governor, as to any intention of fraud. By the same conveyance, which brought his orders to insure, he wrote to the company every thing which he knew or suspected: he desired *nothing to be kept a secret, which [*597] he wrote either to them or his brother. His subsequent conduct, down to the 8th of *February*, 1760, shewed that he thought the danger very improbable. The reason of the rule against concealment is, to prevent fraud and encourage good faith. If the defendant's objections were to prevail in the present instance, the rule would be turned into an instrument of fraud. The underwriter here, knowing the governor to be acquainted with the state of the place; knowing that he apprehended danger, and must have some ground for his apprehension; being told nothing of either, signed this policy without asking a question. If the objection, 'that he was not told,' is sufficient to vacate it, he took the premium, knowing the policy to be void, in order to gain, if the alternative turned out one way; and to make no satisfaction, if it turned out the other: he drew the governor into a false confidence, that if the worst should happen, he had provided against total ruin; knowing at the same time, that the indemnity to which the governor trusted, was void. There was not a word said to him of the affairs of *India*, or the state of war there, or the condition of *Fort Marlborough*. (*a*) If he thought that omission an objection at the time, he ought not to have signed the policy, with a secret reserve in his own mind to make it void: if he dispensed with the information, and did not think this silence an objection then, he cannot take it up now, after the event. What has been often said of the Statute of Frauds may, with more propriety, be applied to every rule of law, drawn from principles of natural equity, to prevent fraud, 'that it should never be so turned, construed, or used, as to protect, or be a means of fraud.' After the fullest deliberation, we are all clear that the verdict is well founded; and that there ought not to be a new trial: consequently, that the rule obtained for that purpose ought to be discharged."

In the case of *Planche and another* v. *Fletcher*, (*b*) the plaintiffs, *Planche* and *Jaquery*, merchants in *London*, insured *goods "on board the [*598] *Swedish* ship called the *Mary Magdalena*, lost or not lost, at and from *London* and *Ramsgate* to *Nantz*, with liberty to call at *Ostend*, being a general ship in the port of *London* for *Nantz*." There was a declaration in the policy, "that the insurance was made on account of certain persons, carrying on trade under the name and firm of *Vallee* et *Duplessis*, Monsieur *Lassau le Jeune*, *Gillaume Albert*, et *Potier de la Gueule*." The defendant underwrote the policy for 300*l*., at three guineas per cent. The ship's clearances from the custom-house in *London*, and her other papers, were all made out for *Ostend* only, but the ship and goods were intended to go directly from *London* to *Nantz*, without going to *Ostend*. Bills of lading, in the *French* language, dated the 18th of *July*, 1778, were signed by the captain in *London*, but purported to be made at *Ostend*, and that the goods were shipped there, to be delivered at *Nantz*. The policy was subscribed by the defendant on the 7th of *July*, and the lading was taken in between the 24th of *July* and the 17th of *August*. The proclamation for making reprisals on *French* ships bore date the 29th, and appeared in the *Gazette*, on the 31st of *July*. Two underwriters had signed the policy after the proclamation, at the same premium of three guineas: one on the 31st of *July*, and the other on the 7th of *August*. The ship sailed on the 24th of *August*, and was taken by a king's cutter, on her way to *Nantz*. After her departure from *Gravesend*, the captain threw overboard all the papers which he had received from the custom-house at *London*. They had been obliterated by the custom-house officers at *Gravesend*, and

(*a*) Freeland v. Glover, 7 East, 457. (*b*) Doug. 251.

were no longer of any use. The ship was released by the Admiralty, but the goods were condemned. The plaintiffs had no connection or share in the ship. Such were the material facts in this case, as they were stated by Lord *Mansfield* in his report, upon a rule to show cause why there should not be a new trial. The cause had been tried at the last sittings at *Guildhall*, and a verdict found for the plaintiffs. The grounds for the application for a new trial were
[*599] two—1st, That there was a fraud on the *underwriters, the ship having been cleared out for *Ostend*, and yet never having been designed for that place. 2ndly, That as hostilities were declared after the policy was signed, and before the ship sailed, the defendant ought to have had notice, that he might have exercised his discretion, whether he would choose for a peace-premium to run the risk of capture. Beside the facts above mentioned, his Lordship stated, that the plaintiff had produced evidence to show, that all ships going with goods of *British* manufacture to *France*, clear out for *Ostend*, without meaning to go thither; and that this is universally understood by persons concerned in that branch of commerce. The reasons suggested for clearing out for *Ostend*, and afterwards making bills of lading as from that place, were, that the light-house duties are saved, which are payable when the voyage is known to be directly down the channel; and that the *French* duties are less upon goods from *Ostend* than from *England*.

Lord *Mansfield*.—"This verdict is impeached upon two grounds—1st, It is said there was a fraud on the underwriters in clearing out the ship for *Ostend*, when she was never intended to go thither. But I think there was no fraud on them—perhaps not on any body. What had been practised in this case was proved to be the constant course of the trade, and notoriously so to every body. The reason for clearing for *Ostend*, and signing bills of lading as from thence, did not fully appear; but it was guessed at. The *Fermiers Generaux* have the management of the taxes in *France*. As we have laid a large duty on *French* goods, the *French* may have done the same on ours; and it may be the interest of the farmers to connive at the importation of *English* commodities and take *Ostend* duties, rather than stop the trade, by exacting a tax which amounts to a prohibition. But, at any rate, this was no fraud in this country. One nation does not take notice of the revenue laws of another. With regard to the evasion of the light-house duties, the ship was not liable to confiscation on that account. 2ndly, The second objection is, that the policy was made
[*600] before, and the ship *sailed after, the proclamation for reprisals. But every man in *England* and *France*, on the 17th of *July*, expected the immediate commencement of a war. I will not say it was actually commenced, but the ambassadors of both countries were recalled; the *Pallas* and *Licorne* were taken; the fleets were at sea; and, as it appeared afterwards, were waiting for each other to fight. It does not appear that the goods were *French* property; an *Englishman* might be sending his goods to *France* in a neutral ship. But it is indifferent whether they were *English* or *French*. The risk insured extends to all captures, and as two other underwriters signed at the same premium after the proclamation, it appears that the war-risk was in view when the defendant signed. Shall he avail himself of an event which increases the risk, but which he had in contemplation when he underwrote the policy? I am of opinion that there should not be a new trial." The three other Judges concurred, and the rule was discharged.

So the Court have held, in *Atkinson* v. *Abbott*, (*a*) that, where the object of the insurance was found by the jury to be meritorious, the policy was good, although, in consequence of expected hostilities with *Denmark*, an order of

(*a*) 11 East, 135.

the King in council had issued, prohibiting the clearing out of any *British* ship to a *Danish* port, and a clearance was consequently taken out for a neutral port in the neighbourhood, the adventure being legal, namely, to supply the *British* fleet with provisions, and not contravening the spirit of the order in council, which issued as a precautionary measure to prevent the vessels of this country from being detained in *Danish* ports in the event of hostilities. The false clearance, too, was strongly urged as an objection to the policy; but Lord *Ellenborough* and Mr. Justice *Le Blanc* both declared that the mere circumstance of taking a clearance to a place where a ship does not intend to go, does not make the voyage illegal, so as to vacate the policy. The statute of 13 & 14 Charles 2, c. 11, s. 3, imposes a penalty of 100*l.* for taking [*601] *out a false clearance, but does not render the voyage illegal. That was determined, said Lord *Ellenborough*, in *Planche* v. *Fletcher*, though the statute was not referred to.

A similar decision was made in the case of *Meyne* v. *Walter*. (*a*) It was an action on a policy of insurance on a *Portuguese* ship, at and from *Madeira*, to her port of discharge in *Jamaica*, with liberty to touch at the *Leeward Islands*. The defendant underwrote 150*l.* upon it; the ship was captured by a *French* privateer, and condemned in the Court of Admiralty in *France*, on the ground of having an *English* supercargo on board. The action was brought to recover this loss from the underwriter, who refused to pay, alleging that the plaintiff should have disclosed to him that the supercargo was *English*. At the trial, a verdict was given for the plaintiff, upon a case reserved for the opinion of the Court, and containing, in substance, the facts just stated.

For the defendant it was insisted, upon the argument, that the agent for the insured ought to have disclosed this fact; and that it was the more material in this case because during the present war an ordinance passed in *France*, similar to one made in the last war, in 1756, which declares that no *Dutch* ship shall be allowed to take on board a supercargo belonging to any nation at enmity with the Court of *France;* and that if any ship, having such a supercargo, be taken, it shall be condemned as lawful prize.

Lord *Mansfield*.—"It is an oppressive and arbitrary rule, and contrary to the law of nations. If both parties were ignorant of it, the underwriter must run all risks; and if the defendant knew of such an edict, it was his duty to inquire if such a supercargo were on board. It must be a fraudulent concealment of circumstances that will vitiate a policy. But it is remarkable that neither party has said a word respecting the treaties between *France* and *Portugal*." Judgment was accordingly given for the plaintiff.

*Thirdly, we come to consider one class of cases, in which a misrepresentation has frequently been held to render the policy void. [*602]

In the case of *Flinn* v. *Headlam*, (*b*) it was held that, where an agent made a policy on a ship, misrepresented the nature of the cargo which she was to carry, but this was not inserted in the policy, and it did not appear that the underwriter was induced by the misrepresentation to accept the risk, the misrepresentation was not material and did not vitiate the policy.

In the case of *Pawson* v. *Watson*, (*c*) upon a rule to shew cause why a new trial should not be granted, Lord *Mansfield* reported as follows:—"This was an action upon a policy of insurance. At the trial it appeared in evidence that the first underwriter had the following instructions shown to him:—"Three thousand five hundred pounds upon the ship *Julias Cæsar*, for *Halifax*, to touch at *Plymouth*, and any port in *America:* she mounts twelve guns and

---

(*a*) R. R. East, 22 Geo. 3. Park Ins. 431.
(*b*) 9 B. & C. 693. (*c*) Cowp. 785.

twenty men." These instructions were not asked for, nor communicated to the defendant: but the ship was only represented generally to him as a ship of force: and a thousand pounds had been done, before the defendant underwrote any thing upon her. The instructions were dated the 28th of *June*, 1776, and the ship sailed on the 23rd of *July*, 1776, and was taken by an *American* privateer. That at the time of her being taken, she had on board six four-pounders, four three-pounders, three one-pounders, six half-pounders, which are called swivels, and twenty-seven men and boys in all for her crew; but of them, sixteen only were men, (not twenty as the instructions mentioned) and the rest boys. But the witness said, he considered her as being stronger with this force, than if she had twelve carriage guns and twenty men: he also said, (which is a material circumstance) that there were neither men nor guns on board at the time of the insurance. That he himself insured at the same pre-
[*603] mium, *without regard or inquiry into the force of the ship. Other underwriters also insured at the same premium without any other representation than that she was a ship of force. That to every four-pounder there should be five men and a boy. That in merchant ships boys always go under the denomination of men. This was met by evidence on the part of the defendant, saying, that guns meant carriage guns, not swivels; and men meant able men, exclusive of boys. There were three causes of the same nature depending upon the same evidence. The defence in each was, that these instructions were to be considered as a warranty, the same as if they had been inserted in the policy: though they were not proved to have been shewn to any but the first underwriter. In all the three cases, the question for the Court to determine is, whether the instructions, which were shewn to the first underwriter, are to be considered as a warranty inserted in the policy; or as a representation, which would avoid the policy, if fraudulent? If the Court should be of opinion, that the instructions amounted to a warranty, then a new trial is to be had in each without costs; otherwise the verdicts, which are all for the plaintiffs, are to stand. At the trial I was of opinion, that it would be of very dangerous consequence to add a conversation, that passed at that time, as part of the written agreement. It is a collateral representation, and if the parties had considered it as a warranty, they would have had it inserted in the policy. But, secondly, if these instructions were to be considered in the light of a fraudulent misrepresentation, they must be both material and fraudulent: in that light, I held, that a misrepresentation made to the first underwriter ought to be considered as a misrepresentation made to every one of them, and so would affect the whole policy. Otherwise, it would be a contrivance to deceive many; for where a good man stands first, the rest underwrite without asking a question: and if he be imposed upon, the rest of the underwriters are taken in by the same fraud." The case was left to the jury under that direction.

[*604] After argument at the Bar, Lord *Mansfield* asked, whether *there was any case that made a difference between a written and a parol representation? No answer being given, his Lordship proceeded: "there is no distinction better known to those who are at all conversant in the law of insurance, than that which exists between a warranty or condition, which makes part of a written policy, and a representation of the state of the case. Where it is a part of the written policy it must be performed. As if there be a warranty of convoy, there it must be a convoy; nothing else will answer the idea intended by the warranty: it must be strictly performed as being a part of the agreement; for in the case of convoy it might be said, the party would not have insured without convoy. But as, by the law of merchants, all dealings must be fair and honest, fraud infects and vitiates every mercantile contract. Therefore, if there be fraud in a representation, it will avoid the policy, on account of the fraud, but not on account of the non-compliance with any part of the

agreement. If in a life policy, a man warrant another to be in good health, when he knows at the same time he is ill of a fever, that will not avoid the policy on the ground of misrepresentation, (though it will be void for non-compliance with the warranty) because by the warranty, the insured takes the risk upon himself. But if there be no warranty, and he say, "the man is in good health," when in fact he knows him to be ill, it is false. So it is, if he do not know whether he be well or ill; for it is equally false to undertake to say that which he knows nothing at all of, as to say that is true which he knows is not true. But if he only say 'he believes the man to be in good health,' knowing nothing about it, nor having any reason to believe the contrary; there, though the person is not in good health, it will not avoid the policy, because the underwriter then takes the risk upon himself. So that there cannot be a clearer distinction than that which exists between a warranty, which makes part of the written policy, and a collateral representation, which, if false in a point of materiality, makes the policy void: but if not material, it can hardly ever be fraudulent. So far from the usage *being to consider instructions as a part of the policy, that parol instructions were never entered [*605] in a book, nor written instructions kept till a few years ago, upon occasion of several actions brought by the insured upon policies, where the brokers had represented many things they ought not to have represented, in consequence of which the plaintiffs were cast. I advised the insured to bring an action against the brokers, which they did, and recovered in several instances: and I have repeatedly at *Guildhall*, cautioned and recommended it to the brokers, to enter all representations made by them in a book. That advice has been followed in *London;* but it appeared lately, at the trial of a cause, that at *Bristol*, to this hour, they make no entry in their books, or keep any instructions. The question then is, whether in this policy the person insuring has warranted that the ship should positively and literally have twelve carriage guns and twenty men? That is, whether the instructions given in evidence are a part of the policy? Now I will take it by degrees. The two first underwriters before the Court are Watson and Snell. Says Watson, "It is part of my agreement that the ship shall sail with twelve guns and twenty men: and it is so stipulated, that nothing under that number will do: ten guns with swivels will not do." The answer to this is, read your agreement; read your policy. There is no such thing to be found there. It is replied Yes, but in fact there is; for the instructions upon which the policy was made, contain that express stipulation. The answer again is, there never were any instructions shewn to Watson; nor were any asked for by him. What colour then has he to say that those instructions are any part of his agreement? It is said, he insured upon the credit of the first underwriter. A representation to the first underwriter has nothing to do with that, which is the agreement or terms of the policy. No man who underwrites a policy, subscribes by the act of underwriting, to terms of which he knows nothing: but he reads the agreement, and is governed by that. Matters of intelligence, such as that a ship is or is not missing, are *things in which a man is guided by the name of a first underwriter, who [*606] is a good man, and to which another will therefore give faith and credit: but not to a collateral agreement, of which he can know nothing. (*a*) The absurdity is too glaring, it cannot be. By extension of an equitable relief in

(*a*) This point, how far a representation made to the first underwriter shall be taken to extend to all the rest, was about to be discussed in the case of Marsden v. Reid, 3 East, 572. The facts did not sufficiently raise the question. But the Court seemed inclined to the affirmative, although the case had not proceeded far enough to require attention to Lord Mansfield's distinction. But in Bell and others v. Carstairs, 2 Camp. 544, Lord Ellenborough said, "It is difficult to see on what principle of law a representation made to the

cases of fraud, if a man is a knave with respect to a first underwriter, and makes a false representation to him in a point that is material; as where having notice of a ship being lost, he says she was safe; that shall affect the policy with regard to all the subsequent underwriters, who are presumed to follow the first. How then do Watson and Snell underwrite the ship in question? Without knowing whether she had any force at all. That proves the risk was equal to a ship of no force at all; and the premium was a vast one; eight guineas. So much therefore for those two cases. The third case is that of Ewer, who saw the instructions, with the representations which they contained. Did the number of guns induce him to underwrite the policy? If it did, he would have said, put them into the policy; warrant that the ship shall depart with twelve guns and twenty men. Whereas he does no such thing, but takes the same premium which Watson and Snell did, who had no notice of her having any force. What does that prove? That he is paid and receives a premium as if it were a ship of no force at all. The representation amounts to no more than this; I tell you what the force will be, because it is so much
[*607] the better for *you. There is no fraud in it, because it is a representation only of what, in the then state of the ship, they thought would be the truth. And in real truth the ship sailed with a larger force; for she had nine carriage guns, and six swivels. The underwriters, therefore, had the advantage by the difference. There was no stipulation about what the weight of metal would be. All the witnesses say, that she had more force than if she had twelve carriage guns, in point of strength, convenience, and for the purpose of resistance. The supercargo in particular says, "he insured the same ship and the same voyage, for the same premium, without saying a syllable about the force." Why then it was a matter proper for the jury to say, whether the representation was false, or whether it was in fact an insurance as of a ship without force. They have determined, and I think very rightly, that it was an insurance without force. Ewer makes an objection, that the representation ought to be considered as inserted in the policy; but the answer to that is, he has determined whether it should be inserted in the policy or not, by not inserting it himself. There is a great difference whether it shall be considered as a fraud. But it would be very dangerous to permit all collateral representations to be put into the policy. I am extremely glad to hear that a great many of the underwriters have paid. Mr. Thornton has paid, who was the first person that saw the instructions. Shall the rest refuse, then? As to Watson and Snell, they have no presence to refuse: for there is not a colour for the objection made by them. As to Ewer, we are all satisfied with the determination of the jury against him. Therefore the rule for a new trial must be discharged."

On the Monday following, Mr. Devenport said, he was desired by the underwriters to ask, whether it was the opinion of the Court, that to make written instructions valid and binding as a warranty they must be inserted in the policy? Lord *Mansfield* answered, that most undoubtedly that was the opinion of the
[*608] Court: if a man warrant that a *ship shall depart with twelve guns, and it depart with ten only, it is contrary to the condition of the policy.

In the case of *Bize* v. *Fletcher*, (*a*) which was an action on a policy of insurance on the ship *Carnatic*, *East Indiaman*, "at and from *Port L'Orient*

---

first underwriter is considered to be made to them who afterwards underwrite the policy. That rule being established, I will abide by it; but will not allow it to be extended. You must shew the representation to be made to the first underwriter on the policy or to the defendant himself." See Brine v. Featherstone, 8 Taunt. 869.

(*a*) Doug. 284.

to the isles of *France* and *Bourbon*, and to all or any ports or places, where and whatsoever, in the *East Indies*, *China*, *Persia*, or elsewhere, beyond the *Cape of Good Hope*, from place to place; and during the ship's stay and trade backwards and forwards, at all ports and places, and until her safe arrival back at her last port of discharge in *France*." But at the same time that this policy was subscribed, there was a slip of paper wafered to it, and shown to the underwriters, on which was written the following representation:—The ship has had a complete repair, and is now a fine and good vessel, three decks. Intends to sail in *September* or *October* next (1776.) It is to go to *Madeira*, the isles of *France*, *Pondicherry*, *China*, the isles of *France* and *L'Orient*."

The ship did not sail till the 6th of *December*, 1776, and did not reach *Pondicherry* till the 23rd of *July*, 1777. She continued there till the 23rd of *August* following, when, instead of proceeding to *China*, she sailed for *Bengal*, where having passed the winter and undergone considerable repairs, she sailed from thence early in the year 1778, (being the second ship that left the *Ganges*) returned to *Pondicherry*, and after taking in a homeward bound cargo at that place, proceeded in her voyage back to *L'Orient*, but was taken in *October* in that year, by the *Mentor* privateer. The usual time in which the direct voyage between *Pondicherry* and *Bengal* is performed, is six or seven days; but the *Carnatic* was about six weeks in going to *Bengal*, and two months on the way back from thence to *Pondicherry*. Both going and returning, she either touched at, or lay off *Madras*, *Masulipatam*, *Visigapatam*, and *Yanon* and took in goods at all those places.

*It was contended in this cause, at the trial, that the representation accompanying the policy restrained the voyage to the limits therein [*609] specified. They produced some letters from the owners to their correspondents, one of which was to the following effect:—"We doubt not, but on account of the storm the ship will be forced to go to *Bengal* to be laid down, which cannot be done at *Pondicherry*, in which case our captain will have entered a protest, which we will forward in time to you." In a subsequent letter they say nothing of the storm or leak; but mention a different cause for the ship's going to *Bengal*. These letters, it was said, raised a presumption that the necessity of going to *Bengal* was merely a pretence devised after the capture, and when the insured began to apprehend that the words of the policy would not cover a voyage to that place.

Lord *Mansfield* told the jury, "that the first question was, whether the policy was void, on account of misrepresentation? Now there is an essential difference between a warranty and a representation. The warranty is a part of the contract: a risk described in the policy is part of the contract. There can be no warranty by any collateral representation. The ground on which a representation affects a policy, is fraud, the representation must be fraudulent, that is, it must be false and material in respect to the risk to be run. All risks are governed by the nature of them; and the premium is governed by the risk. Where a representation accompanies an instrument, it says, "I will have this understood as my present intention: but I will have it in my power to vary it." The great question in this cause is, whether the representation was false, and that in a material instance? Fraud is found out by the materiality of the point it is charged in. It is to be considered, then, whether they had really a view of going to *China*. A witness has proved that the difference of insurance is one per cent. on going to *Bengal*, and not to *China*. If you think that this was a misrepresentation to avoid paying the one per cent. you will find for the defendant. But if you are satisfied that the real intention, at the time of *the representation, was to go to *China*, the plaintiff will be enti- [*610] tled to your verdict: for the insured may change his intention, to go to *Bengal*, and yet be protected by the policy, which clearly admits of that voyage, and

must be understood by both parties in a greater latitude than the representation, being expressed in different and much more comprehensive terms. If, upon the whole evidence, you shall be of opinion, that no fraud was intended, and that the variance between the intended voyage, as described in the slip of paper, and the actual voyage as performed did not tend to increase the risk to the underwriters, this slip of paper being only a representation, you must find for the plaintiff." The jury found a verdict accordingly. And although in several causes upon the same ship, new trials were moved for, and granted; yet in this, which was the only cause in which there was a representation, the verdict was acquiesced in, and no motion respecting it ever was made. (*a*)

In a previous part of this section it was laid down, (*b*) as that if a representation be made to the underwriter of any circumstance which was false, this, if it be in a material point, shall vacate the policy, and annul the contract, although it happened by mistake, and without any fraudulent intention or improper motive on the part of the insured.

In the case of *Macdowall* v. *Fraser*, (*c*) which was an action on a policy of insurance on the ship "The *Mary* and *Hannah*, from *New York* to *Philadelphia*." At the time when the insurance was made, which was in *London*, on the 30th of *January*, the broker represented the situation of the ship to the underwriter as follows: "The *Mary* and *Hannah*, a tight vessel, sailed with several armed ships, was seen safe in the *Delaware* on the 11th of *December*, by a ship which arrived at *New York*." In fact, the ship was lost on the 9th of *December*, by running against a *cheveau de frieze*, placed *across the river. The cause came on to be tried before Lord *Mansfield* at *Guildhall*. The defence was founded on the misrepresentation as to the time when the ship was seen; and the representation and the day of the loss being proved, the jury found for the defendant. A rule was obtained on the part of the plaintiff, calling upon the defendant to show cause why there should not be a new trial. After argument at the Bar,

[*611]

Lord *Mansfield* said:—"The distinction between a warranty and a representation is perfectly well settled. A representation must be fair and true. It should be true as to all that the insured knows; and if he represents facts to the underwriter, without knowing the truth, he takes the risk upon himself. But the difference between the fact as it turns out, and as represented, must be material. The case of the *Julius Cæsar* was very different from this. (*d*) The ship there was only fitted out when the insurance was made. No guns nor men were put on board. It was only said what was meant to be done; and what was done, though different, was as advantageous, or more so, than what had been represented. There was no evidence of actual fraud in the present case, and no question of that sort seemed to be made. But there was a positive averment that the ship was seen in the *Delaware*, on the 11th of *December*. The underwriter was deceived as to that fact, and entered into the contract under that deception. There was no evidence at the trial when she was seen in the *Delaware*, or in what condition: but suppose the fact had been explained in the manner now suggested, why did the insured take upon him to compute the day of the month on which she had been seen? Why did he not mention exactly what his information was, and leave the underwriter to make the computation. In insurances on ships at a great distance, their being safe up to a certain day is always considered as a very important circumstance. I am of opinion that the representation concerning the day was material."

(*a*) See Weston v. Eames, 1 Taunt. 115. Robertson v. Majoribanks, 2 Stark. 573.
(*b*) Page 572, and *ante*, p. 589, by Lord Mansfield, in Carter v. Boem.
(*c*) Doug. 260.
(*d*) *Vide ante*, the case of Pawson v. Watson, p. 602.

*A similar decision was made by the same learned Judges at a period subsequent to that of the case of *Macdowall* and *Fraser* in [*612] the case of *Shirley* v. *Wilkinson*. (*a*)

Upon a motion for a new trial, Lord *Mansfield* and the rest of the Court were clearly of opinion, that if the broker, at the time when the policy is effected, in representing to the underwriter the state of the ship, and the last intelligence concerning her, does not disclose the whole, and what he conceals shall appear material to the jury, they ought to find for the underwriter, the contract in such case being void; although the concealment should have been innocent, the facts not mentioned having appeared immaterial to the broker, and having not been communicated merely on that account.

In the case of *Barber* v. *Fletcher*, (*b*) upon a motion for a new trial, one of the grounds stated to induce the Court to grant it was, that since the trial, a material representation, which had been made to Shulbred, the first underwriter upon the policy, and which turned out to be false, had been discovered. Shulbred made an affidavit, by which it appeared, that when he signed the policy in March, 1778, the broker was getting several others, on other ships, subscribed at the same time, all belonging to the same owner, and said, speaking of them all, "which vessels are expected to leave the coast of *Africa* in *November* or *December*, 1777." In truth, the vessel in question had sailed in May, 1777, and Shulbred swore, that if he had known that circumstance, he would not have signed. There had been actions brought against all the underwriters on the policy, except Shulbred.

Lord *Mansfield*.—"It has certainly been determined in a variety of cases, that a representation to the first underwriter extends to the other. (*c*) But under what circumstances has the defendant gone to trial in this case? He certainly knew what had been represented to himself. He was acquainted *with Shulbred, and had an opportunity of asking before the trial [*613] what had been represented to him. If, therefore, this evidence is new, it is owing to his own negligence. But the representation is not material; it was only an expectation, and the underwriters did not inquire into the ground of the expectation. This was lying by till after a trial, in order to make an objection if the verdict should be for the plaintiff." The rule was discharged.

In the case of *Hull* v. *Cooper*, (*d*) where a policy is made "at and from" a given place, the terms of the instrument seem to import that the vessel is either at the place when the policy is made, or will shortly be there; and the insured cannot be said to be guilty of deception if the ship be not at the place at the very time of making the policy. If the ship do not arrive for some time, it is a question for the jury, whether the delay materially varied the risk. And where a policy was made on the 13th of *August*, in *London*, on a voyage at and from *Heligoland* to the *Baltic*, and the ship did not even sail from the *Thames* on her outward voyage till the 27th, the question was left for the consideration of the jury, who found that the delay was not material. So where a broker, on making a policy whilst the ship was on her outward voyage, represented that a cargo was ready for her, and that she was sure to be an early ship; this was held to amount only to expressing an expectation and belief; and the underwriters were held liable, although from the day in loading the cargo the voyage home was changed from a summer into a winter risk.

It has been mentioned, that it is immaterial, whether the act be of the assured or of his agent, this was shewn in a case before the House of Lords, of *Stewart*

(*a*) 3 Doug. 41. (*b*) 1 Doug. 305.
(*c*) Pawson v. Cowper, *ante*, p. 605. Marsden v. Reid, 3 East, 572.
(*d*) 14 East, 479. Hubbard v. Glover, 3 Camp. 313. See also Brine v. Featherstone, 4 Taunt. 869. Driscol v. Passmore, 1 Bos. & Pull. 200.

v. *Dunlop.* (*a*) It came before the House on an appeal from the Court of Session in *Scotland*, which had determined in favour of the respondents, the underwriters. The case was shortly this:—"A man *having [*614] arrived at *Greenock*, knowing of the loss of the ship insured, and meeting a friend and intimate acquaintance of the insured, and a partner with him in some other adventurers, communicated the intelligence of the loss of the ship to him, who desired it might be concealed. The same day, as appears by the evidence, the person who had received this information held a conversation with the plaintiff's clerk, who made this deposition, that neither at that time, nor at any other time of the said day, had he any conversation whatever with the said Mr. Boog, or message from him, either in writing or otherwise, relative to the *Peggy* (the ship insured) nor did he get any hint from him or any other person, relative to the making insurance upon her, further than the said Mr. Boog's asking the deponent if he knew whether there was any insurance made upon her, and if there was any account of her." After this conversation the plaintiff desired the clerk to write to get an insurance made, which he did, without stating a word (at least it did not appear that he stated any) of this conversation to his master. Upon the whole of the evidence in this cause, although it did not appear by any deposition that the plaintiff knew of the loss of the ship at the time he made the insurance, the Lords of Session decreed, "that the insurance made by the plaintiff would not have been made, if the brigantine *Henrietta* had not arrived in the road of *Greenock* the day preceding, and brought intelligence that the ship *Peggy* was taken; and therefore, that the policy was void." The House of Lords confirmed this decree.

But in the end of the same year, a cause of *Fitzherbert* v. *Mather*, (*b*) was decided in the King's Bench, expressly upon the point of fraud in the agent; for it appeared that the insured was not guilty of any improper conduct in the transaction. In that case the circumstances were numerous; and the Judges gave their opinions *seriatim* upon the question.

It was an action on a policy of insurance for 110*l.* underwritten [*615] *by the defendant on the 21st of *September*, 1782, at six guineas per cent. on a cargo of oats on board the ship *Joseph*, lost or not lost, at and from *Hartland* to *Portsmouth*, beginning the adventure from the loading thereof on board the said ship at *Hartland*. The defendant pleaded the general issue, and paid the premium into Court. This cause came on to be tried before Mr. Justice *Buller* at *Guildhall*, when a verdict was found for the plaintiff, subject to the opinion of the Court upon the following case:—

That on the 27th of *July*, 1782, William Bundock, of *Pool*, agent for the plaintiff, contracted with Richard Thomas, of *Hartland*, a corn factor, for the purchase of five hundred quarters of oats, to be consigned to William Fuller, at *Portsmouth*, on plaintiff's account; and desired Thomas to send him (Bundock) a bill of lading and invoice, and also a like bill of lading and invoice to the plaintiff at Mr. Fisher's, at the *Tower*, *London*. That in pursuance thereof, Thomas shipped the oats on board the ship insured, which sailed from *Hartland* on the 16th of *September*, 1782, and was lost the same day off the pier of *Hartland*. That on the 16th of *September*, 1782, Thomas wrote to the plaintiff's agent at *Portsmouth*, and informed him that he had that morning shipped the oats, and the ship sailed immediately, but he was afraid the wind was coming to the westward, and would force her back. He also wrote, on the same day, to Fisher, the plaintiff's agent in *London*, to the same effect, in order that he might insure, adding these words, "I wish the whole safe to hand; this evening appears stormy."—About six or seven o'clock the same

(*a*) H. of Lords, April 8, 1785. (*b*) 1 T. R. 12.

evening, Thomas heard that the ship was on shore, and at six o'clock the next morning (the 17th) he knew she was lost. That the mode of sending letters from *Hartland* to *London* is as follows: the letters are collected by a private hand about one or two o'clock of the day on which the post sets out from *Biddeford*, from which place it goes about nine o'clock in the evening. That the 16th of *September* was not a post-day; and the above letters did not leave *Hartland* till one o'clock in the afternoon of the 17th, which was *the post-day from *Biddeford* to *London:* and the letters which [*616] went from *Biddeford* by the post of that evening, were received in *London* on the 20th of *September*.

Fisher having been previously directed by the plaintiff to insure the cargo, as soon as the bill should be sent him, directed the insurance to be made, which was done on the 21st.—Upon this case, the Court gave judgment for the defendant.

Lord *Mansfield* said:—"This policy is made by misrepresentation, and that misrepresentation arises from the proper agent of the plaintiff who gives the intelligence. Now whether this happened by fraud or negligence, it makes no difference; for in either case the policy is void. As to the misrepresentation, the underwriter was warranted on the information of the agent to take for granted that the ship was safe at twelve or one o'clock of the 17th of *September;* for the agent gives an account of the ship being loaded, and says, "I wish the whole safe to hand." Then there was a strong ground to believe on his letter, that she was safe when the post came away; and the post-mark shews the day when the letters were sent. How does this misrepresentation come? Why from Thomas, who writes to Fisher, and gives him notice of the ship's sailing, on purpose that he may insure; for so he says expressly in his letter to Bundock. He was honest at the time he wrote the letter; but on the 16th, at night, he hears that the ship is gone ashore, and the next morning he knew that she was absolutely lost. The post did not go out till the afternoon of that day; and he had full opportunity to send an account of the loss. If Thomas were not guilty of fraud, at least he was guilty of gross negligence; but either way, if Thomas were perfectly innocent, this policy, being effected by misrepresentation, is void."

Mr. Justice *Buller*.—"In order to shew that Thomas was not the agent of the plaintiff, the counsel has assumed a fact, which is contrary to the case; for it is said, that the insurance was not made in consequence of Thomas's letter. But what *is the fact? The plaintiff's letter to Fisher desires him [*617] to insure, as soon as the bills of lading are sent. By whom were they to be sent? By Thomas; then he refers to Thomas for all the information, and as the foundation of the insurance. The plaintiff, I dare say, is innocent; and so is the defendant. But if the plaintiff build his information on that of his agent, and his agent be guilty of a misrepresentation, the principal must suffer. It is the common question every day at *Guildhall*, when one of two innocent persons must suffer by the fraud or negligence of a third, which of the two gave credit. In this case, the plaintiff trusted; not the defendant: Thomas had very material information, which he did not communicate: the consequence of which is, that the policy is void, and the *postea* must be delivered to the defendant." (*a*)

There has been a very recent case in this subject of *Elkin* v. *Janson*, (*b*) in the Court of Exchequer. Assumpsit on a policy of insurance on the ship

---

(*a*) See Wake v. Atty, 4 Taunt. 493, where a broker in pursuance of instructions effected a policy at a time when a letter lay on his table unopened at the Coal Exchange, acquainting him with the loss: and it was held that the jury were warranted in finding that this was not a sufficient want of diligence to avoid the policy. (*b*) 13 M. & W. 655.

Fanny, on a voyage at and from *Seville* to *London*. The policy was stated to be effected by one Francis A. Sadler, as the plaintiff's agent. The seventh plea stated, that, at the time of making the said policy, that is to say, on the 21st *February*, 1842, to wit, in *London*, the plaintiff wrongfully and improperly concealed from the defendant certain facts and information which the plaintiff before then knew and had received, that is to say, that long before that time, to wit, between five or six weeks before that time, to wit, on the 11th *January*, 1842, the captain of the said vessel in the said policy mentioned had, at *Seville*, drawn a bill of exchange, bearing date the day last mentioned, for ship's disbursements and charges in respect of the said vessel in the said policy mentioned. And that the said bill had been sent from *Seville* on or about the 17th day *of *January*, 1842, and had arrived in *London* on or about the 31st day of that month, which said matters, having reference to the ordinary practice and usages of trade and trades in that behalf, and with reference to the times that had respectively elapsed between the date of the said bill, its departure from *Seville*, its arrival in *London*, and the time of effecting the said policy, and having reference also to the ordinary duration of a voyage from *Seville* to *London*, were material to the risk in the said policy mentioned, and would have raised the rate of premium at which the said policy could have been effected, and ought to have been communicated by the plaintiff to the defendant; and this the defendant is ready to verify, &c.

[*618]

To this plea the plaintiff replied *de injuriâ*, on which issue was joined.

At the trial before *Pollock*, C. B., at the *London* Sittings after last Term, the following facts were proved in evidence:—The ship *Fanny*, of which the plaintiff was the owner, was chartered by *M'Andrew & Son*, of *London*, in *September*, 1841, on a voyage from *Seville*, in *Spain*, to *London*. A ship called the *Heroine*, which sailed from *Seville* on the 8th *January*, arrived at *London* on the 23rd of *January*, 1842, and the plaintiff, on going on board of her, was informed that she had sailed from *Seville* on the 8th, leaving the *Fanny* there loading, and nearly ready to sail. On the 31st, *M'Andrew & Son* received intelligence from *Seville* of the *Fanny* having sailed on the 11th, and they received by post a bill drawn on the 11th, at *Seville*, by the master, for the disbursements of the ship at that port. These circumstances they communicated to the plaintiff. On the 21st of *February*, the plaintiff acquainted his broker with the fact of the bill having been received from *Seville*, and directed him to effect an insurance of the *Fanny* on her homeward voyage. The insurance was accordingly effected by the broker, on the same day, with the defendant, an underwriter at *Lloyd's*, but it did not appear that he mentioned the receipt of the bill, and he stated at the trial that he himself was unacquainted with the *date of it. The *Fanny* never arrived, and assuming that she sailed on the 11th, she was, according to the time occupied in the voyage from *Seville* to *London*, a missing ship at the time the insurance was effected. It did not distinctly appear in what manner the case was left to the jury, but they found in the first instance a general verdict for the defendant. Afterwards, in reply to a question from the learned Judge, they said they thought the drawing of the bill was a material fact for the defendant to have known, but that there was no evidence before them on which they could decide whether that fact was or was not communicated to him. The Chief Baron then directed the verdict to be entered for the plaintiff on all the issues, with leave to the defendant to move the Court, in order that the verdict should ultimately be entered on the seventh plea as the Court should think right under all the circumstances of the case. A rule to shew cause why the verdict should not be entered for the defendant on the issue raised by the seventh plea having accordingly been obtained,

[*619]

The counsel for the plaintiff contended, that in this case the jury have found that it was a fact material for the defendant to have known that this bill was

drawn at *Seville* on the 11th of *January;* and they were right in so doing. It was a fair inference from the drawing of the bill that the loading of the vessel was nearly completed, which would fix the probable time of her sailing. But the question is whether, upon the pleadings in this case, the onus of proving that he had communicated that material fact to the defendant lay upon the plaintiff, or whether it lay on the defendant to shew that it had not been communicated to him. Now, the seventh plea, on which the question arises, is a plain confession and avoidance, and concludes with a verification; and therefore, the burthen of proving the allegations contained in it lay on the party pleading them; and one of those allegations is, that the plaintiff wrongfully and improperly concealed from the defendant certain facts and information which the plaintiff then knew and had received. The *defendant ought not [*620] only to prove, that such material facts existed, to the knowledge of the plaintiff, but to give some reasonable evidence to shew that they were not communicated to him, or that he had no notice of the facts so alleged to have been concealed. It is a rule that fraud is not to be presumed, but must be proved, and the same rule will apply to suppression of facts. The ordinary rule is, that if the plaintiff produces and proves the contract, it is for the defendant to make out that it is invalid. This plea contains no traverse of any fact which the plaintiff was bound to establish; but the allegations in it are of facts and circumstances which the defendant was bound to affirm by evidence. If a party wishes a contract to be dependent upon a condition, he must take care that it is made a condition precedent to the contract itself, otherwise it cannot be vitiated except by shewing fraud. The judgment of *Parke*, B., in the case of *Cornfoot* v. *Fowke*, (*a*) shews that a misrepresentation not embodied in the contract cannot vitiate it, except it be fraudulently made. *Parke*, B.—I have not the least doubt about it, except in the case of insurance, which is a contract *uberrimæ fidei*, vitiated not only by the slightest fraud, but by any misrepresentation or concealment of material facts, which are deemed equivalent to fraud. But there is a very learned treatise (*b*) by an American lawyer, Mr. Duerr, in which he dissents from the common notion that misrepresentation vitiates policies on the ground of its being a species of fraud.

The counsel for the defendant contended, that the assured was bound to communicate this fact to the underwriters, and the onus of shewing that he did so lay upon him. But if not, the jury have in effect found that it was not communicated. It is clear that this non-communication of a material fact to the underwriter avoids the policy, and it is not necessary for that purpose that there should be fraud: *Gladstone* v. *King*, (*c*) **Shirley* v. *Wilkinson*, (*a*) *Fitzherbert* v. *Mather*. (*b*) In the latter case it was held, [*621] that any person acting by the orders of the insured, and who is in anywise instrumental in procuring the insurance, is bound to disclose all he knows to the underwriter before the policy is effected; and that when any misrepresentation arises from his fraud or negligence, the policy is void. The principle upon which a policy is avoided on the ground of the concealment of a material fact, is one which is not applicable to any other contract. In other cases the party is capable of judging for himself, but in the case of a policy the contract is founded on the representation of the assured, and it is on that ground that an implied warranty has been introduced, that the assured or his agent has communicated every thing connected with the risk. The policy implies that there

---

(*a*) 6 M. & W. 358.

(*b*) A Lecture on the Law of Representations in Marine Insurances, by John Duerr, LL. D. Counsellor at Law. New York, 1844.

(*c*) 1 M. & Selw. 35.

(*a*) Doug. 306, *ante*, p. 612.

(*b*) 1 T. R. 12, *ante*, p. 614.

is no extraordinary circumstance or material fact not communicated, which at all alters the nature of the risk, and that the assured has no knowledge which affects the risk which he does not communicate; and he contracts that there is none. Then if it be shewn that there is such a material fact, it is for the assured to shew that he communicated it. There are two questions which always arise in cases of this kind, namely, did a fact exist which was known to the assured or his agents, and was it communicated to the underwriter? *Alderson*, B.—The assured is bound to put the underwriter in the same situation with respect to knowledge as he is in himself.

Parke, B.—If it is not perfectly clear what the jury intended by the verdict they have given, or what was the point put to them by the Lord Chief Baron, there ought to be a new trial, for it is quite clear that the verdict cannot be entered for the plaintiff upon the case as it now stands. My present impression certainly is, that, with respect to the allegations contained in this plea, the burthen of proof lay on the defendant, and that he was bound to give some [*622] evidence of the non-communication, at the time he effected the policy, *of the fact which the jury have found to be a material one for him to know; for, although this allegation is negative in its terms, still, as it was the duty of the assured to make that communication, either upon the principle that every policy is based on the supposed existence of a certain state of facts, or on the ground that insurance is a contract *uberrimæ fidei*, I think some evidence ought to have been given by the defendant, to shew that that material communication was not made to him. Generally speaking, the mere fact of subscribing the policy would be sufficient evidence, in a case like the present; no prudent man, with such information as the plaintiff was here possessed of, namely, that the ship which it was proposed to insure had sailed from a port for so long a period as to be a missing ship, would have executed a policy of insurance on her. In this present case no doubt can exist that no such communication was made to the underwriter, for the natural channel for it to come through would be the broker, who swore that he himself was ignorant of the date of the bill. That was enough to cast the burden of proof on the other side; and I think the jury, in the absence of evidence to the contrary, would be bound to find that the fact in question was not communicated, and consequently, they would be amply justified in finding their verdict for the defendant. I, however, entertain some doubt, whether my Lord Chief Baron, by the mode in which he left the case to the jury, did not cast the *onus probandi* on the wrong party; and whether they, in their finding, did not adopt that view. It is only on those grounds that I think there ought to be a new trial, because I think the plaintiff is not entitled to a verdict on the evidence before us.

Alderson, B.—I am of the same opinion, and think it clear that the issue upon this plea lay on the defendant. It is a necessary averment in the plea, that the communication in question was not made. I take this plea to amount, as the plaintiff's counsel has fairly argued, to four propositions:—first, that the facts relied on really existed; secondly, that the knowledge of them was mate- [*623] rial to the underwriter, inasmuch *as it would have a tendency to raise or lower the premium on the policy about to be made; thirdly, that those facts were known to the plaintiff; and fourthly, that they were not communicated to the defendant. The defendant must make out every one of those propositions,—namely, that the facts stated were true, that they were material, and within the knowledge of the plaintiff, and that they were not communicated to himself. The *onus probandi* in this case rests on the same principle as that in actions upon bills of exchange, when the latter are properly examined. Take the case of an action by the holder against the acceptor of a bill of exchange; where the declaration alleges, that such a person drew his

bill of exchange, which was accepted by the defendant, and indorsed by the drawer to A., who indorsed it to the holder; and the defendant pleads, that, as between himself and the drawer, the bill was an accommodation bill, and denies that the indorsements from the drawer to A., and from A. to the holder, were indorsements for value; to which the plaintiff replies *de injuriâ;* in that case the defendant must prove all the averments in the plea. If he merely proves that the bill was an accommodation bill, that does not satisfy the jury of the truth of the allegation that the indorsements were without value, which would otherwise be inferred from those indorsements themselves. Indorsement means such an act as enables the party to whom the bill is given to raise money on it. Consequently, the fact of the bill being an accommodation bill, does not raise any inference that the indorsements were not for value, and so the defendant does not maintain that part of his plea, the burden of proving which lay on him. But take the case of fraud;—where the defendant, who is sued upon a bill of exchange, pleads that it was obtained from the drawer by fraud on the part of A., and that A. then indorsed it to the holder; there proof of the fraud renders it highly probable that A., who has obtained the bill from the drawer by fraud, and has not been able to get anything from him, would hand it over to some one else, to be the conduit-pipe for obtaining value for it. That raises *a presumption, until some answer is given, that there has been no indorsement for value, and casts upon the plaintiff, after this general [*624] evidence, the necessity of negativing that presumption, and of shewing that, although the above inference might fairly be made from the fact of there being fraud in the original inception of the bill, value has in fact been given for it by the indorsee. In both these cases, the issue is alike on the defendant, but in the latter of them he discharges his duty by giving general evidence in support of his plea, while in the former he does not. In a case like the present, slender evidence of a material communication not having been made is all that can be required from a defendant. Suppose the case to be that the ship about to be insured was burnt, and that the plaintiff knew of it at the time he effected the insurance. No one could have any doubt whether such a fact as that had been communicated to the defendant or not; and proof of the fact itself would be reasonable evidence to shew that it had not been communicated, because the absurdity of such an insurance is so great, that you would naturally conclude that the insurer could not be aware of the fact of the ship's destruction by fire when he executed the policy. So here, it is almost impossible to believe that the defendant would have insured this ship, had he known that she had sailed from *Seville* so long before, that she must be considered as a missing ship at the time the policy was effected. It was proved affirmatively that the time of her sailing was communicated to the plaintiff, and that is sufficient to require some affirmative evidence from him, to shew that it was also communicated to the defendant. If I am to consider myself as sitting here as a juryman, I have no hesitation in saying that the verdict was right. But I am not in that position, and the question for our consideration is, have the jury distinctly understood this view of the question, and of the evidence affecting it? and if there exist any reasonable doubt about that, it is better that the case should go again to a jury, in order that the whole matter may be fairly put to them; when perhaps *the plaintiff may be able to give some reasonable evidence [*625] to rebut the inference of non-communication.

Pollock, C. B.—I also think there ought to be a new trial, as the finding of the jury was imperfect. The verdict for the plaintiff, which was delivered in the first instance, was withdrawn by the subsequent special finding of the jury. That ultimate finding was, that there was no evidence for them to act upon, and there was no finding upon the question whether the material fact stated on the plea was communicated to the underwriter or not. I at the time acted on the

impression that I should reserve the question now before us for further consideration, without, at the moment, expressing any opinion on the point. I certainly do not feel the same absence of doubt which has been expressed by the other members of the Court, as to the question on whom the burden of proof lay in this case. It is sufficient, however, for me to say that there must be a new trial, on account of the imperfect finding of the jury; and, under all the circumstances, I think it ought to be without costs. Rule absolute for a new trial. (*a*)

From these cases, the principle, which we sought to establish, is evident, viz: that whether the fraud or misrepresentation be the act of the insured or of his agent, the policy is void, and the contract between the parties is vacated and annulled.

It remains to be considered on this subject, whether by the law of *England* the premium is to be returned to the assured where the contract is void on the ground of fraud, and consequently no risk run: and whether the underwriter is liable to an action if he refuse to refund?

[*626] *By the ordinances of *France* it is declared, that if fraud shall be proved against the assured, he shall be obliged to restore whatever he may have received from the underwriter, and, in addition, to pay double the premium. And if the fraud be proved against the underwriter, he must return the premium, and pay the assured double the sum insured. *Valin*, in his commentaries upon these ordinances, justly observes, "that if the offence is fully proved against the assured, his punishment is too small, and that the punishment of the assured and assurer is nearly equal, although the crime is greater when the premium and the value of the property is considered. (*b*) It seems to be difficult to distinguish the crime of the assured and the assurer, as if it were to have been punished by a criminal law, the pecuniary amount would scarcely enter into the consideration, for the moral offence is the same, though the gain by the fraud may be greater in the one case than in the other. And, therefore, as the edicts of *France* make a money recompense matter of it to the injured party, considering the risks both run of suffering through fraudulent concealment and misrepresentations, they declare as the punishment to each individually, to pay double the sum which the other respectively would have received in case the contract had been fair, and a return in one case of the money received, and in the other case to pay the double of the sum insured."

In this country there was no decision in the Courts of law for some time, and no legislative enactment upon the subject; but in the Court of Chancery, where the underwriters have been relieved from their payments, the decree directed the premium to be returned.

Thus in the case of *Whittingham* v. *Thornborough*, (*c*) in the year 1690, the defendant and others had come to the insurance office, and brought a policy for insuring the life of one Horwell (upon whose life they had no concern or interest depending) for a year; and the policy ran whether interested or not

[*627] *interested, at a premium of 5*l.* per cent. They took this way of drawing in subscribers: they agreed with one Marwood, a known merchant upon the Exchange, and a leading man in such cases, to subscribe first; but in case Horwell died within the year, Marwood was to lose nothing,

(*a*) The Lord Chief Baron afterwards referred the Reporters to the case of Williams v. East India Company, 3 East, 192, which had not been cited upon the argument. It was there held, that wherever the not giving notice of a fact would be criminal, the notice would be presumed; and that, in all cases where the affirmative would be presumed, the party pleading no notice must give some evidence of the negative, and that the best evidence of which the nature of the thing was capable.

(*b*) 2 Valin, 96.

(*c*) Prec. in Chanc. 20, and 2 Vern. 206.

but, on the contrary, was to share what should be gained from the other subscribers. Upon the credit of Marwood's subscribing, several others (who had inquired of Marwood about Horwell, who was his neighbour) subscribed likewise. Horwell lived about four months, and then died; and this bill was brought to be relieved against the policy: and this matter being all confessed by the answer, the Court decreed the policy to be delivered up, and the premium to be repaid.

So also in the case of *Da Costa* v. *Scandret*, (*a*) which has already been cited in a former part of this section, Lord *Macclesfield*, although he held the policy to be void, on the ground of fraud, decreed the premium to be returned to the insured.

It is true, that during the argument in the case next to be quoted, the counsel cited a case of *Racker* v. *Hollingbury*, in which the Master of the Rolls had been of a different opinion from that delivered in the two preceding cases. But Lord *Mansfield* said, that there must be some mistake in reciting the case before the Master of the Rolls, for the practice of the Court of Chancery was certainly agreeable to the two former cases.

The case in which this observation was made, was *Wilson* v. *Ducket*, (*b*) in an action on a policy of insurance on a ship, with a count of a general *indebitatus assumpsit* for money had and received to the plaintiff's use, and damages were laid at 98*l*. The trial was had, under a decree of the Court of Chancery, where the now defendant, the insurer, being there complainant, had offered to pay back the premium, which was 10*l*. No money was, in the present case, paid into Court, though the usual course in these cases is for the *defendant, the insurer, to bring the premium into Court. The [*628] jury found a verdict for the plaintiff, for the ten pounds' premium, on the count for money had and received to his use, although they were of opinion against the policy, upon the foot of fraud, and found against it, as being fraudulent. In fact, the first underwriter was only a decoyduck, to induce other persons to underwrite the policy; and it had been previously agreed between the insured and him, that he should not be bound by signing the policy, which this Court considered as a fraud, and therefore that the jury had given a right verdict in finding the policy fraudulent. With the concurrence of Lord *Mansfield* (before whom this cause was tried) and of the counsel on both sides, it was agreed to bring this question before the Court, whether, upon a policy of insurance being found fraudulent, the premium should be returned to the plaintiff, (the insured) or retained by the defendant (the insurer?) The cases above-mentioned were quoted by the counsel for the plaintiff; but they being all in Chancery, Lord *Mansfield* said, he wanted to know whether there was any common law determination to the same effect. As it did not appear that there was, his Lordship said, it was plain what must be done in this case; for he looked upon the offer made by the complainant's bill in equity, to be the same thing as if the money had actually been brought into Court in the present case.

But although the common law had been so silent upon the subject, as not to lay down any general rule, and although in all the cases stated the premium was restored, yet if the fraud is notorious, palpable, and gross in its nature, the Court may order, and has ordered, the underwriter to retain the premium.

Thus in *Tyler* v. *Horne*, (*c*) where an action was brought by the insured to recover 150*l*., being the amount of the defendant's subscription, the ground of refusal was, that the insurance was fraudulent; and that the plaintiff knew

---

(*a*) 2 P. Wms. 170. *Vide ante*, p. 577. (*b*) 3 Burr. 1361.
(*c*) Sit. at Guild. after Hil. 1785. See Park Ins. 455.

[*629] of the *loss of the ship at the time of effecting the policy. The counsel for the plaintiff were under the necessity of admitting that their client had made some fraudulent insurances upon this very ship, subsequent to the one now in dispute, but contended that the news of the loss of the ship had not arrived till after this particular one was made. The evidence, however, was so strong as easily to convince the jury that the plaintiff had received information of the loss before the order for making the insurance was given to the broker; and they found a verdict for the defendant.

Lord *Mansfield* said,—"The fraud was so gross, that the premium should not be recovered from the underwriter."

At last this great question came to be expressly decided in the case of *Chapman and others* v. *Fraser*, (*c*) where the agent of the assured only had been the guilty person, and the whole Court of King's Bench were of opinion, that in all cases of actual fraud on the part of the assured or his agent, the underwriter might retain the premium.

If a policy be avoided on account of a misrepresentation made without any fraud, the assured is entitled to a return of premium (*Feise* v. *Parkinson.*) (*d*)

It is to be observed that it has been laid down as clear law that, if the underwriter has been guilty of fraud, an action lies against him, at the suit of the insured, to recover the premium. Thus it was said by Lord *Mansfield*, in the case of *Carter* v. *Boehm*, (*e*) which has already been quoted at large in this section:—"The policy would be void against the underwriter if he concealed anything; as, if he insured a ship on her voyage, which he privately knew to be arrived, and an action would lie to recover the premium."

By several of the foreign ordinances the punishment of fraud in matters of insurance is exceedingly severe. By those of *Amsterdam* it is declared, "That as contracts of insurance are contracts of good faith, wherein no fraud

[*630] or deceit ought *to take place, in case it be found that the insured or insurers, captains, shippers, pilots, or others, used fraud, deceit, or craft, they shall not only forfeit by their deceit and craft, but shall also be liable to the loss and damage occasioned thereby, and be corporally punished for a terror and example to others, even with death, as pirates and manifest thieves, if it be found that they have used notorious malversation or craft." (*a*) The ordinances of *Middleburg* contain a provision exactly in the same words. At *Stockholm*, also, it has been declared that such an offender, besides restitution to the party injured, shall, according to the circumstances of every particular affair, be punished in his estate, honour and life. (*b*)

Frauds in contracts of insurances have not as yet had any punishment affixed to them by the laws of *England*, that I have been able to learn; but there are one or two cases which have been declared to be felonious by positive statutes where the act committed has been to the prejudice of the underwriters. (*c*)

(*c*) B. R. Trin. 33 Geo. 3. Park Ins. 456.
(*d*) 4 Taunt. 640.
(*e*) 3 Burr. 1909.
(*a*) Ord. of Amsterdam, art. 56; 2 Mag. 146.
(*b*) Art. 30; 2 Mag. 76; 2 Mag. 288.
(*c*) See 1 Vict. c. 89, s. 6, *ante*, p. 346.

SECTION II.

OF ILLEGAL VOYAGES.

Although a great deal has been said in the preceding part of this Treatise of voyages in general, nothing has been said about any illegality that might affect the voyage and render it void. I shall, therefore, in this section, proceed to show that in many instances a voyage which is prohibited by the laws of the country, renders every insurance on it void, and the policy of no effect. And the rule is this, "that whenever an insurance is made on a voyage expressly prohibited by the common, statute, or maritime law of the country, the policy is of no effect. The principle upon which such a regulation is *founded, is not peculiar to this kind of contract; for it is nothing [*631] more than that which destroys all contracts whatsoever: that men can never be presumed to make an agreement forbidden by the laws; and if they should attempt such a thing, it is invalid, and will not receive the assistance of a Court of Justice to carry it into execution." (*a*)

1. The most material case upon this point is that of *Johnston* v. *Sutton*, (*b*) which came on to be argued in the year 1779, and received the solemn opinion of the Court of King's Bench.

It was an action on a policy of insurance on goods, on board the ship *Venus*, "lost or not lost, at and from *London* to *New York*, warranted to depart with convoy from the channel for the voyage." The cause was tried before Lord *Mansfield*, at *Guildhall*, and a verdict was found for the plaintiff. The defendant obtained a rule to show cause why there should not be a new trial. The facts, upon his Lordship's report, appeared to be these:—The ship was cleared for *Halifax* and *New York*. She had provisions on board, which she had a license to carry to *New York*, under a proviso in the prohibitory act of 16 Geo. 3, c. 5. But one-half of the cargo, including the goods, which were the subject of this insurance, was not licensed, and was not calculated for the *Halifax* market, but for *New York*. There had been a proclamation by Sir William Howe to allow the entry of unlicensed goods at *New York;* and though there were bonds usually given at the Custom House here, by which the captain engaged to carry the goods to *Halifax*, those bonds were afterwards cancelled, on producing a certificate from an officer appointed for that purpose at *New York*, declaring that they were landed there. The commander-in-chief had no authority under the act of Parliament to issue such proclamation, or to permit the exportation of unlicensed goods. The *Venus* was taken in her passage to *New York* by an *American* privateer. The first section of the statute prohibits all commerce with *the province of *New York*, [*632] (amongst others,) and confiscates all ships and their cargoes which shall be found trading, or going to or coming from trading with them. (*c*) In section the second there is a proviso, excepting ships laden with provisions for the use of his Majesty's garrisons or fleets, or for the inhabitants of any town possessed by his Majesty's troops, provided the master shall produce a license specifying the voyage, &c., and the quantity and species of provisions; but by the same proviso it is declared, that goods not licensed, found on board such ship, shall be forfeited. After argument, upon the motion for a new trial,

---

(*a*) See Park Ins. p. 497.
(*b*) Doug. 254.
(*c*) 16 Geo. 3, c. 5.

Lord *Mansfield* said—"The whole of the plaintiff's case goes on an established practice, directly against an act of Parliament. If the defendant did not know that the goods were unlicensed, the objection is fair as between the parties. If he did, he would not deserve to be favoured. But, however that may be, it was illegal to send the goods to *New York*, and, in *pari delicto, potior est conditio defendentis.* It is impossible to bring this within the cases cited, (*b*) because here there was a direct contravention of the law of the land." The rule for a new trial was made absolute.

Upon the same principle it was that in the cause of *Camden and others* v. *Anderson*, (*c*) which was long contested in the Court of King's Bench, and afterwards upon a writ of error in the Exchequer Chamber, the underwriters were held not liable, the insurance in that case being made in direct contravention of the exclusive right of trading granted to the *East India Company* by stat. 9 & 10 Wm. 3, c. 44, s. 81, and which exclusive right had never for one moment been suspended, nor had that statute ever ceased to be an existing law. Indeed the principle which destroys all insurances made on ships proceeding on illegal voyages, never was contested at the Bar in the argument of the above cause; but only the *application of it to the particular case, on account of various statutes which had been passed and repealed, and on account of a clause in a more modern statute, which it was supposed precluded the underwriters from setting up this defence. (*a*) But no man attempted to argue that that which is unlawful, and a public wrong, could be the ground of an action.

[*633]

2. Soon after the above decision, a case of *Wilson* v. *Marryat*, (*b*) arose, in which the rights of the *East India Company*, as far as they were affected by the treaty between this country and *America*, came to be discussed in an action on a policy of insurance. By the 13th article of that treaty, which was confirmed by stat. 37 Geo. 3, c. 97, s. 22, the United States of *America* are permitted to trade to and from the *British* territories in *India*. But it was contended, notwithstanding the treaty and statute, that the insurance in question was upon an illegal voyage, being "at and from *Bourdeaux* to *Madeira* and the *East Indies*, and back to *America*," whereas the treaty meant to tolerate no other trading than a direct one between *America* and the *East Indies:* and also it was insisted, that Butler and Collet, the persons for whose benefit this insurance was effected, were not entitled to the benefit of the treaty, they being natural-born subjects of this country, but one of whom, after the ratification of *American* independence, had gone with his wife and family to reside in *America*, has ever since been domiciled there, and received as a citizen of the States of *America*, and the other of whom was resident and domiciled in *America* before the independence of that country, and has continued to be resident and domiciled there: and because their agent, the plaintiff, when he shipped the goods, and when he caused the policies to be effected, was resident in, and a subject of *Great Britain*, and knew that the ship was destined for the *British* territories in *India*. The special verdict in this case was three times argued in the King's Bench, and once in the Exchequer Chamber; and the learned Judges composing both those Courts, were *unanimously of opinion that a natural-born subject of this country, though he cannot throw off his allegiance to the country, yet he may be a citizen of *America* for the purposes of commerce, and entitled in the latter character to all the benefits of

[*634]

(*b*) These were cases of insurances on ships trading contrary to the revenue laws of foreign countries, of which more will be said hereafter.

(*c*) 6 T. R. 723; 1 B. & P. 173.

(*a*) 33 Geo. 3, c. 52, s. 150. Park Ins. 499.

(*b*) 8 T. R. 31; 1 B. & P. 430.

the treaty: and that the trade allowed by the treaty between *America* and the *East Indies* need not be direct; it may be carried on circuitously through any country in *Europe*, including *Great Britain*. The plaintiffs had judgment. In the Court of King's Bench, Lord *Kenyon* added, that if in the commencement of one entire voyage there be anything illegal, and an insurance be effected on the latter part of the voyage, which taken by itself would be legal, such illegal commencement would have made the whole illegal, and the assured could not recover upon the policy.

And the question again came before the Court in the case of *Bell* v. *Reid*,(*a*) where it was held, that a natural-born subject of this country, domiciled in a foreign country in amity with this, may lawfully exercise the privileges of a subject, where he is domiciled, to trade with another country, in hostility with this.

Lord *Stowell* likewise acknowledges this rule of law respecting the privileges which a subject of one country is able to exercise, by becoming resident and domiciled in another. In the case of the *Matchless*, (*b*) he says, "Mr. Millidge is described in the claim as a *British*-born subject, but at present residing at *Boston*. He is described as residing with his family there, and he appears in this transaction as exporting goods thence. Not a word has been produced to shew that he is not a settled merchant of that city. A question, then, arises of great moment, regarding as well the interests of a state as the interests of its subjects. Is such a person to be considered as a merchant of *Great Britain*, or a merchant of *America?* Upon such a question it has certainly been laid down by accredited writers on general law, and upon grounds apparently not unreasonable, that if a *merchant expatriates himself, as a merchant to carry on the trade of another country, exporting its produce, paying its taxes, employing its people, and expending his spirit, his industry, and his capital in its service, he is to be deemed a merchant of that country, notwithstanding he may, in some respects be less favoured in that country than one of its native subjects. Our own country, which is charged with holding the doctrine of unextinguishable allegiance more tenaciously than others, is no stranger to the application of this rule. Its highest tribunals which adjudicate the national character of property taken in war apply it universally." His Lordship, after referring to the authorities above-mentioned, proceeds, "under the shelter of these authorities, I should incline to hold, if I were compelled to face the general question, that a *British* merchant resident in a foreign country must part with some commercial privileges which he would preserve if resident at home, whilst he acquires others by residence abroad."

[*635]

So also in pursuance of the principle just adverted to, as falling from Lord *Kenyon*, the Court of King's Bench, in a much contested case of *Bird* v. *Appleton*, (*c*) held, that if a ship was insured "at and from *Canton* to *Hamburgh*," and during her stay at *Canton* was engaged in an illegal traffic, the assured could not recover for the ship in the course of the voyage from *Canton* to *Hamburgh*. (*d*)

By the statute of 9 Ann. c. 21, all vessels navigating within the limits of the exclusive trade of the *South Sea Company* were required to have a license from the *South Sea Company*. (*e*) The 42 Geo. 3, c. 77, repealed the necessity of a license from either the *East India* or *South Sea Company* for ships passing through the *Straits of Magellan*, or round *Cape Horn*, and trading

(*a*) 1 M. & S. 726.
(*b*) 1 Hagg. A. R. 103.
(*c*) 8 T. R. 562.
(*d*) See Sewell v. Royal Exch. Comp. 4 Taunt. 856.
(*e*) Toulmin v. Anderson, 1 Taunt. 227; *ante*, p. 344.

in the *Pacific Ocean* from *Cape Horn*, to 180 degrees west longitude from
[*636] *London;* whether *they combine fishing with trading or not. (*a*)
This point was further cleared by 55 Geo. 3. c. 57, and 141. (*b*)

If a ship, though neutral, be insured on a voyage prohibited by an embargo, laid on in time of war by the prince of the country, in whose ports the ship happens to be, such an insurance also is void. This depends upon the power of an embargo, the right of laying on which by the sovereign of this country in time of war is undoubted, although in time of peace it may be a different question. The right being admitted, it follows of course, that any act done in contravention of a proclamation of this nature, is illegal and criminal, because it is equally binding as an act of Parliament, and a contract founded on such illicit proceedings is consequently void.

This was determined in a case of *Delmada* v. *Mottcux*, (*c*) upon a special verdict. It was an action on a policy of insurance on the *Bella Juditta*, a *Venetian* ship, at and from *London* to *Grenada*, with liberty to touch at *Cork* and *Madeira* to load. The defendant pleaded the general issue, and the cause came on for trial before Mr. Justice *Buller*, when the jury found a special verdict, the material facts in which were these:—That the ship was a *Venetian* vessel, and the plaintiff a subject of the state of *Venice;* that in *October*, 1782, the ship sailed on her voyage from *London* to *Cork*, and there took in a
[*637] loading of provisions, the property *of *French* subjects, the enemies of the King of *Great Britain*. That the said ship, having taken in at *Cork* clearances and bills of lading for *Madeira*, an island belonging to the King of *Portugal*, sailed in *December*, 1782, from *Cork* to that island, at which she was neither to unload any part of her cargo, nor to receive any goods on board, but where she took clearances and bills of lading for the island of *St. Thomas*, belonging to *Denmark*, whither she was not destined; that on her voyage from *Madeira* to *Grenada*, within fourteen leagues of the latter, she was captured by an *English* man-of-war as prize, and carried to *St. Lucia;* that when the ship sailed from *London*, and from thence till after the capture, *Grenada* was in the possession of the *French* king. The special verdict further finds, that his Majesty, on the 18th day of *August*, 1780, laid an embargo upon all ships and vessels laden or to be laden in the ports of the kingdom of *Ireland* with black cattle and hogs, beef, pork, butter, and cheese, or any sort of provisions. It is also found, that after the capture, a suit was commenced in the Vice Admiralty Court at *Barbadoes*, against the said ship and cargo, as belonging to the *French* king, or to some of his subjects; and the Judge of that Court did condemn the cargo as the property of the enemies of the King of *Great Britain*, which sentence was appealed from, and is now depending; that the Judge of the said Court of Vice Admiralty was of opinion, that the said ship *Bella Juditta* was the property of Abraham Delmada, the plaintiff, and ordered that the ship should be restored; but he did not conceive the owner of the said ship to be entitled to any freight, or damages occasioned by the capture, because she was engaged in a wrong act, and the captor did no more than his duty; that the said ship was accordingly restored.

(*a*) Jacob v. Jansen, 3 Taunt. 534. Gill v. Dunlop, Hil. 56, Geo. 3, in C. P.

(*b*) See Cowie v. Barber, 4 M. & S. 16, where these acts of Parliament do not appear to have been adverted to. The 45 Geo. 3, c. 34, bestowed on foreign ships the same privilege which the 42 Geo. 3, c. 77, gave to British built ships. The Court of Error, however, in the case of Dunlop v. Gill afterwards reversed the decision of C. P. And they held that the 45 Geo. 3, c. 34, only repealed the navigation act as to foreign built ships, and did not confer upon them (when navigating under its provisions with the king's license) all the privileges of British built ships, and therefore that the former could not trade to the western coast of America without a South Sea license, 1 B. & A. 334; and see the present navigation law, 3 & 4 Wm. 4, c. 54.

(*c*) B. R. Mich. 25 Geo. 3. Park Ins. p. 505.

Upon this verdict, the question for the Court to decide in point of law, was whether the insurers upon the ship on this voyage were liable to pay for this loss of freight, and the damages occasioned by the capture?

Lord *Mansfield*.—"Is this voyage not a breach of the embargo? [*638] *The king in time of war has an undoubted right to lay an embargo: in time of peace it is another question. Every power lays them on. If the ship had only been carrying goods of an enemy on a voyage lawful for her to perform, she might have been entitled to freight. But here the sentence says, she shall not. And why? because she has done a wrong thing. It is a fraud: for under a colour of a neutral port, she goes to an enemy's port. She breaks an embargo. What the consequence of that is, has not as yet been settled; but to break an embargo is undoubtedly a criminal act; and wherever a man makes an illegal contract, this Court will not lend him their aid." The defendant accordingly had judgment.

Though an insurance upon a smuggling voyage, prohibited by the revenue laws of this country, would be void under the principle above stated; yet the rule has never been supposed to extend to those cases, where ships have traded, or intend to trade, contrary to the revenue laws of foreign countries, because no country takes notice of the revenue laws of another; in such cases, therefore, the policy is good and valid, and if a loss happen, the underwriter will be answerable.

Thus in the case of *Planche* against *Fletcher*, which was stated at large in a preceding section, (*a*) one of the objections taken to the insurance was, that there was a fraud on the underwriters, the ship having been cleared out for *Ostend*, although she was never designed to go to that place. But Lord *Mansfield* declared, for himself and his brethren, that it was no fraud on the underwriters, perhaps on nobody. The reason for clearing for *Ostend*, and signing bills of lading as from thence, did not fully appear: but it was guessed at. The *Fermiers Generaux* have the management of the taxes in *France*. As we have laid a large duty on *French* goods, the *French* may have done the same on ours, and it may be the interest of the farmers to connive at the importation of *English* commodities, and take *Ostend* duties rather than stop the *trade by exacting a tax, which amounts to a prohibition. But at [*639] any rate, this was no fraud in this country. One nation does not take notice of the revenue laws of another.

In another case of *Lever* v. *Fletcher*, (*b*) a short time afterwards at *Guildhall*, Lord *Mansfield*, in his charge to the jury, advanced the same doctrine which had been established by the whole Court in the preceding case.

It was an action on a policy of insurance, at and from *London* to *Pensacola* and *Manshae*, in the river *Mississippi*, with liberty to touch at *Portsmouth* and *Jamaica*. The ship insured was employed in the usual trade in the river *Mississippi*, and traded at *Little Manshae*, on the island of *New Orleans*, part of the dominion of *Spain*. *Manshae*, the place mentioned in the policy, is part of the continent of *North America*, on that side of the river which *France* and *Spain*, by the treaty of *Paris* in 1763, surrendered to *Great Britain*, and is about thirty-seven leagues higher up the river than *New Orleans*. The loss happened by a seizure of the ship at *Little Manshae* by the *Spanish* governor, as a reprisal for transgressions alleged to have been committed by a king's ship in the *Lakes*. The counsel for the defendant contended, that the policy in question was on a trading voyage, and that the trade itself was an illicit one.

Lord *Mansfield*.—"The first question is, whether this policy covers the trading on the *Mississippi* before the ship's arrival at *Manshae?* The trading

(*a*) Sect. 1, part 2, p. 597. (*b*) Lond. sit. Hill. Vact. 1780. Park Ins. p. 506.

at *Little Manshae* is a delay of the voyage, and an increase of the risk. If the policy do not cover this part of the trading, then it is a deviation, and there is an end of the contract, at least so as to prevent the plaintiff from recovering. It is very clear what the trade is. Every trading with the subjects of *Spain* is illicit by the treaty of *Paris*. The navigation is free to both countries; and the municipal laws of both countries remain. Though such trading be contrary to the laws of *Spain*, yet no country pays attention to the revenue laws of another. [*640] Therefore, if *the defendant had, with full knowledge that it was a smuggling trade with *Spain*, made the insurance then it might be a fair contract between the parties. But the main question for consideration seems to be, whether this trading at *Little Manshae* was insured by the policy?" The jury found for the defendant, and it may be presumed on the ground of deviation.

Mr. J. *Park* in his Treatise, (*a*) has some remarks on the subject of *trading with an enemy*, which I shall copy into this Treatise. He says, "it cannot be improper, because it is nearly connected with the subject before us, to enter upon the inquiry, how far trading with an enemy in time of actual war is legal? The opinion of foreign writers upon this point, cannot fail to afford information upon the question. It has long been settled in *France*, that all trading with enemies is illegal. (*b*) This indeed is given as the reason for requiring to be inserted in the policy of insurance, the name and place of abode of the insured, the effects upon which the insurance is made, the name of the ship and the place of loading and unloading. By complying with such a requisition, it is known in time of war, whether, notwithstanding the prohibition of commerce, which, according to these writers, a declaration of war always imports, the subjects of the king continue to trade with the enemies of the state, or with their friends and allies; by which means they would be able to convey warlike stores, provisions, and other prohibited goods to the enemy. But everything of this kind being forbidden, as prejudicial to the state, would be liable to confiscation, and to be condemned as prize, whether found in ships of our country, or of friends and allies. (*c*) The prohibition to insure the property of an enemy, which is almost generally established by the ordinances of foreign countries, proceeds upon the principle, that it is unlawful to trade with an enemy: because [*641] if commerce were allowed to be carried on between the hostile nations, *there could not possibly be an objection to protect that commerce by means of the contract of insurance. (*d*)

The general law of *England* had not, till lately, laid down any express rule upon the subject; but we must take notice of what has passed in the Courts of Justice upon the question. The only ancient cases to be found in the books upon the subject are two; the one is in *Roll's Abridgment*, and happened in the thirteenth year of the reign of *Edward* the Second. (*e*) A license granted to certain merchants to buy and sell in *Scotland*, which was then at war with the King of *England*, was declared to be void: and consequently the trading held to be illegal. The other was a case put to the Judges, in the time of Lord *Somers*, for their opinion upon the point, whether sending corn to the enemy, in time of war and famine, was a crime at the common law. The Judges held it was a misdemeanor. It is to be observed, however, that the last was a case where provisions were supplied, which, as well as warlike stores, must be prohibited from the nature of the thing."

The first modern case, in which trading with an enemy came at all under consideration, although it did not then meet with any decision, was that of

(*a*) Park Ins. p. 507.
(*b*) Guid. c. 2, art. 2, 3, and 5; 2 Val. 31.
(*c*) Bynk. Quest. Jur. Pub. lib. 1, c. 3.
(*d*) Ord. of Stockholm, &c. 2 Mag. 277.
(*e*) 4 Roll. Abr. 173.

Henkle against the *Royal Exchange Assurance Company*, before Lord *Hardwicke* in the Court of Chancery. (*c*) His Lordship there said,—it might be going too far to say that all trading with enemies is unlawful; for that general doctrine would go a great way, even where only *English* goods are exported, and none of the enemy's imported, which might be very beneficial. He was not satisfied with the answer given to the objection of an illicit trade, by citing the case of the *South Sea Company*; (*d*) for that by no means determined the question. That was not trading contrary to the law of this country; but contrary to the agreement of the company: which is different *from a [*642] contract repugnant to the general law of the country, whether statute, common, or maritime law. The same answer might be given to Sir *Robert Nightingale's* case, which was merely a plea in the Exchequer, upon the private right of the company, being contrary only to their statutes, and not to the general law of the land.

From this opinion, it is evident that the question was by no means settled in Lord *Hardwicke's* mind: but in a subsequent case of *Gist* v. *Mason*, (*e*) Lord *Mansfield* strongly argues, that trading with an enemy is not forbidden by the general law of the country: for he says, that several acts of Parliament have been *specially* passed, in order to make such trading illegal, which proves that the Legislature did not think it was so before. The ship, indeed, in the last of these cases, appeared to be neutral; and the Court laid it down, that it had no where been held that an insurance upon a neutral ship trading to an enemy's port was void. But then Lord *Mansfield* went upon the doctrine of a subject's trading with enemies, and concluded thus:—By the maritime law, trading with an enemy is cause of confiscation, provided you take him in the act; but this does not extend to neutral vessels.

The general principle of law that neutral states have a right to continue carrying on their accustomed commerce, after a war has broken out, as during times of peace, is now quite settled, and forms part of the acknowledged law of nations; for it would be most unjust if the interests of a neutral country were to be affected by the disagreement and hostile condition of other states. But this general proposition must be so far qualified that the accustomed commerce which the neutral has in time of peace been carrying on with either of the hostile nations, must in time of war be restricted to such transactions and trade, as do not interfere with the rights of the belligerent parties, and the issue of the contest. And therefore the conveying to an enemy's country *all [*643] articles contraband of war, carrying provisions, &c. to a besieged port, or succouring in any way one of the belligerents is strictly forbidden of neutrals, as having a directly contrary effect on the interests of the other party, an act which a neutral has no right to commit, since by assisting the one party it amounts to a direct declaration of hostility against the other. (*a*) And it is likewise generally allowed, and is certainly recognized as law in this country, that a neutral cannot in time of war extend its trade to such a commerce as arises out of the state of war, and which it would not enjoy in time of peace. And, therefore, as almost every nation naturally confines the carrying of the productions of the mother country to her colonies, and that of the colonies to the mother country during peace, it cannot be permitted to a neutral when a nation at war with another may have difficulty in keeping up a connection with her colonies, to assist her in doing so by the use of its vessels, which may have the double effect of supporting the colonies, and preventing them from falling

---

(*c*) 1 Ves. 317.
(*d*) See *ante*, p. 635.
(*e*) 1 T. R. 88.
(*a*) Sarah Christina, 1 Rob. 242, and Marcurius, 1 Rob. 288; Jonge Tobias, 1 Rob. 330; the Ringende Jacob, 1 Rob. 91.

into the hands of the enemy, and also has the effect of increasing the naval force of that nation. (*b*) And in pursuance of this principle of law several condemnations both of the ship and cargo, engaged in such traffic during the last war, took place in the Admiralty Court of this country. In one of the cases (*c*) Lord *Stowell* says, "upon the breaking out of a war it is the right of neutrals to carry on their accustomed trade, with an exception of the particular cases of a [*644] trade to blockaded places, or in contraband articles (in both of which *cases their property is liable to be condemned) and of their ships being liable to visitation and search. The general rule is, that the neutral has the right to carry on, in time of war, his accustomed trade to the utmost extent of which that accustomed trade is capable. Very different is the trade which the neutral has never possessed, which he holds by no title of use and habit in times of peace, and which in fact can obtain in war by no other title than by the success of the one belligerent against the other, and at the expense of that very belligerent, under whose success he sets up his title, and such I take to be the colonial trade generally speaking." Such a trade, therefore, is illegal, and every insurance upon such voyages would be void. And sentence of condemnation on such grounds would be conclusive proof of a breach of a warranty of neutrality.

The general question, as to the legality of trading with an enemy is now for ever at rest in the law of *England*, by the decision of the Court of King's Bench, in the case of *Potts* v. *Bell*, (*a*) upon a writ of error from the Court of Common Pleas, in which it was held by Lord *Kenyon*, *Grose*, *Lawrence*, and *Le Blanc*, Justices, that it was a principle of the common law, that trading with an enemy, without the king's license, is illegal in *British* subjects.

It was decided in the case of *Feise* v. *Aguilar*, (*b*) if a *British* subject is interested in part of the cargo on a valued policy, he may recover to the extent of it on a count averring the interest in himself; although alien enemies may be interested in other parts of the cargo.

This power of licensing particular trades with hostile states in time of war, is a part of the prerogative of the crown, inherent in itself, receding in that respect from its own rights in time of war; and for the time, for the purposes, and to the extent in the license mentioned, turning the state of war into a state [*645] of peace. But as various restrictions were imposed *by statutes, the king of course could not by virture of his prerogative, dispense with them; and therefore it was necessary for the Legislature, during the long, protracted, and unexampled mode of warfare in which this country was engaged for upwards of twenty years, to pass various acts of Parliament, empowering the sovereign to do that, which he should think advisable, and which his prerogative alone had not enabled him to effect. (*a*)

By virtue of the power granted to the king by these statutes and his own royal prerogative, the trade of this country was preserved: for the sovereign had thus the power of giving an enemy liberty to export or import; he might

---

(*b*) And therefore in the war of 1756, where the French being unable, on account of the maritime superiority of this country, to carry on their colonial trade themselves, repealed their exclusive laws and opened their trade to the ships of neutral powers, this was held by Great Britain to be a direct interference with her maritime rights. See Manning's Comm. p. 196.

(*c*) The Immanuel, 2 Rob. A. R. 198. See Barker v. Blakes, 9 East, 283. Bromley v. Heseltine, 1 Camp. 75. (*a*) 8 T. R. 548.

(*b*) 3 Taunt. 506. See Cohen v. Hannan, 5 Taunt. 101. Hagedorn v. Reid, 1 M. & S. 566.

(*a*) The material statutes were the 43 Geo. 3, c. 153; 45 Geo. 3, c. 34; 46 Geo. 3, c. 111; 47 Geo. 3, c. 27; 48 Geo. 3, c. 37; 48 Geo. 3, c. 126; 49 Geo. 3, c. 25 and 60. Park Ins. 511, 512.

place whole districts of hostile countries in a state of peace, and might exempt individuals, either his own subjects or those of other nations, from the operations of war.

Though the king was thus empowered to license, he might also qualify his license, in which case the party seeking to protect himself under it must conform exactly to its requisitions. The questions which arose in our Common Law Courts upon the constructions of these licenses, granted under statutes, were extremely various: but as they turned in many cases upon the precise words used; as at one time a more strict construction was put upon them than at others; and as most of those cases have been discussed in the Court of Admiralty, by the very learned Judge, Lord *Stowell*, who presided in it, with a profundity of learning and accuracy of judgment seldom equalled, never surpassed, it is impossible, without swelling this work to a most inconvenient length to attempt to follow the decisions, either in one Court or in the others. Nor is it very material to do so, as neither questions of fact, nor the construction of particular documents, unless some general rule arises out of them, can be very material, and as the main question in all of them was much discussed *when the cases of *Usparicha* v. *Noble*, *Menett* v. *Bonham*, and [*646] *Flindt* v. *Crokatt*, (*a*) were decided.

So also in the case of *Vandyck* v. *Whitmore*, (*b*) where the license to trade was on the express condition, that bond be given in such penalty by such persons, and in such manner, as the commissioners of the customs shall direct, that the goods shall be exported to the places proposed, and to no other; and that a certificate shall be produced within six months from the *British* consul, or other person there described, that the goods have been landed; if the bond be not given, the license is void, the voyage illegal, and cannot be insured.

A similar decision had been made in *Vanharthals* v. *Halhead*, *Mic.*, 31 Geo. 3, on the stat. of 16 Geo. 3, c. 5, on which the case of *Johnston* v. *Sutton*, (*c*) had been decided. (*d*)

But although the Courts of Law were in the first instance disposed to construe these licenses strictly, (*e*) it was at length considered that, as the object of the licenses was to facilitate the commerce of the country, that they ought, therefore, to receive a liberal construction; and therefore Lord Chief Justice *Gifford* held, in the case of *Lemecke* v. *Vaughan*, (*f*) that the misdescription of the person to whom a license had been granted by the crown did not invalidate the license, that the object of the license was simply to legalize the adventure, and the conditions imposed were applicable to the ship employed, and not to the person, and that as these conditions had been complied with, it was not material that a misdescription had been made of the residence of the merchant obtaining the license.

*And Lord *Stowell*, in the case of the *Acteon*, (*a*) says:—"It [*647] is true that the license which had been here granted in the usual manner, had afterwards been purchased for money in *America*, but I do not see what difference that can make in the consideration of the case, for if the license was general, which it appears to have been, it could be of no consequence who were the individuals who acted under it, provided they complied

---

(*a*) See also the judgments in Robinson's, Edwards', and Acton's Reports in the Admiralty, and in our Courts of Common Law, in addition to the cases already detailed and referred to in this work, are those of Schroeder v. Vaux, 15 East, 52, Blackburne v. Thompson, 15 East, 81. Rucker v. Allnutt, 15 East, 278, Siffken v. Allnutt, 1 Maule & S. 39. Hagedorn v. Bell, 1 Maule & S. 450.

(*b*) 1 East, 475.
(*c*) *Ante*, p. 631.
(*d*) 1 East, 487, note (*a*).
(*e*) Klingender v. Rond, 14 East, 484.
(*f*) 1 Bing. 473.
(*a*) 2 Dods. A. R. 53.

with the conditions annexed to it; there is nothing whatsoever to show that the parties acted otherwise than in strict conformity to the spirit and letter of the original license, signed by the Secretary of State in *London*, and I must presume so from the circumstance of their obtaining permission from the *British* minister in *Spain* to carry back a cargo to *America*." (*b*)

The Court of King's Bench have held in a recent case of *Camelo* v. *Britten*, (*c*) that where a license for the exportation of gunpowder, was granted on the application of the manufacturer of the gunpowder on behalf of himself and others, on condition that the merchant exporter should give a certain security therein mentioned; and the manufacturer sold the gunpowder to another party, and contracted with him to deliver it on board a ship, the condition of this license was not complied with by the manufacturer giving the required security, he not being the merchant exporter within the meaning of the license.

And in the case of *Gordon* v. *Vaughan*, (*d*) if the license contain a condition which is only colourably complied with, it shall be deemed a fraud upon the license and avoid it.

And the person having the license, must show he was authorized to obtain it, *Rawlinson* v. *Jansen*. (*e*) And if the license be general, he must show, by [*648] evidence, that his use *of it was lawful, from whom he received it, and how he connects his own particular adventure with it. *Barlow* v. *M'Intosh*. (*a*)

And Lord *Stowell* held in a late case of the *Louise Charlotte de Guldeneroni*, (*b*) that the fraudulent alteration of a license destroys its validity, even where the person claiming protection under it is innocent of the fraud. In giving judgment, his Lordship says, "It appears very certain that the date of the license under which the present claim is made, has been altered, and, consequently, that the license itself must become a mere nullity. It is said, however, that although there may have been a fraudulent alteration in the date of the license, yet the present holders, who were entirely ignorant of that alteration, and who purchased the license at a large price in the market overt, ought not to be the sufferers. There is hardly any evidence which would satisfy the Court that the alteration of the date might not be the act of the party himself by whom the benefit of the license is claimed; and, though, it is not at all necessary for me to infer fraud against the party now before the Court, I must, for the sake of guarding against fraudulent acts of this kind, adhere to the general rule, that the party claiming the benefit of a license, must shew a license unimpeached. The present case may be of great hardship upon an innocent individual, but I cannot take upon myself to say that a license which has been vitiated in so material a point, can be deemed valid; and, therefore, I feel myself under the necessity of pronouncing a sentence of condemnation."

And also the Courts of Justice will permit everything to be done, though not expressed, which is necessary, in order to effectuate the intention of his Majesty in granting the license, *ut res magis valeat, quam pereat*. Thus in a case of *Kensington* v. *Inglis*, in Error, (*c*) decided in the Court of King's [*649] Bench, upon a bill of exceptions tendered to Lord Chief *Justice *Mansfield* at *Nisi Prius*, in the Court of Common Pleas, the following facts appeared in evidence, and which are all that are material for the

---

(*b*) This was the case of a license granted by the British government in 1812, to allow any ship, except French, to import corn into Cadiz from any port in the United States. Licenses transmitted from this country to America by the merchants here, and were disposed of as occasion might require.

(*d*) 12 East, 302, note (*b*).

(*a*) 12 East, 311. Bush v. Bell, 16 East, 3. Robinson v. Morris, 5 Taunt. 720.

(*b*) 1 Dods. 308.

(*c*) 4 B. & A. 184.

(*e*) 12 East, 223.

(*c*) 8 East, 273.

discussion of this point. The plaintiffs in the Court below brought their action against Mr. *Kensington*, an underwriter, on a policy dated *February*, 1800, at and from the *Havannah* and *Matanzas*, or any other port or ports in *Cuba*, to *Nassau*, *New Providence*, upon goods, and also upon ship or ships sailing between two given periods of time. The declaration averred that Kensington subscribed the policy for 500*l.* on goods and specie, and that by a subsequent memorandum it was agreed, that the value of any vessel or vessels that should carry the goods insured should be included in that insurance: and that Robert Read, for whose benefit the insurance on the goods and specie was made, was interested in such goods and specie, and that one Juan Villas, for whose benefit the insurance on the ship *Hector* was made, was interested therein. The second count of the declaration averred that the ship *Hector*, on board which the goods and specie were loaded, did not belong to his Majesty, or any of his subjects.

The bill of exceptions, amongst the other necessary facts not material here, stated that *Inglis & Co.* effected the policy, and that a certain cargo of goods and specie belonging to Robert Read had been shipped at the *Havannah* on his account, being part of the property insured, on board the *Hector*, and that the policy was made in respect of the said goods and specie for his benefit, and in respect of the said ship for the benefit of the said Juan Villas, and that Juan Villas was a *Spaniard* by birth, then and still residing in the dominions of, and adhering to, the King of *Spain*, between whom and the King of *Great Britain* there existed an open war, as well at the time of effecting the policy, as also at the time of trial; but that the action was commenced in time of peace. The loss of the ship by perils of the sea is then stated between the *Havannah*, a colony of the King of *Spain*, and *Nassau*, a colony of our king. The bill of exceptions further stated, as applicable to this point, his Majesty's *instructions to Gen. *Dowdeswell*, Governor of the *Bahama Islands*, [*650] (*New Providence* being one,) authorizing him to grant licenses for the importation into those islands of specie and such goods as were loaded on board the *Hector*, in any *British* or *Spanish* vessel of a certain build, (within which the ship *Hector* might be classed,) from any *Spanish* colony in *America*, notwithstanding the then existing hostilities: and the commanders of his Majesty's ships, and also privateers, were enjoined not to detain or molest any vessel trading between the ports therein specified, conformably to the said regulations, and having a license for that purpose. It further appeared, that a license was granted by the governor to Robert Read, for the *Hector*, for the voyage out and home, and was not limited in point of time, and was to enable the *Hector* to bring the goods therein enumerated from the *Spanish* settlement to *New Providence;* that by the laws of *Spain* vessels coming from a *Spanish* settlement, in time of war, cannot clear for a *British* port, but it is the practice to clear for a *Spanish* or neutral settlement: that the witness (who was the governor's secretary) knew the *Hector* to be a *Spanish* vessel, and the property of a *Spaniard*, and she was so described in the license. Upon this point the counsel for the underwriter, Kensington, objected at the trial, that although the voyage and trade were licensed, the plaintiffs *Inglis & Co.* could not enforce a policy for the benefit of Juan Villas, so being such alien enemy as aforesaid. But the Chief Justice *Mansfield* was of opinion, that a ship belonging to an alien might, when so licensed, be lawfully insured by a *British* subject; and that the policy so effected might be enforced by such *British* subject in a Court of Law, for the benefit of such alien owner. This opinion was excepted to; and after argument upon the bill of exceptions, in which it was contended, that the license only protects the goods, but does not give to an alien enemy the right to sue either in his own name, or in the name of his trustee, the Court ook time to deliberate; and now

[*651] Lord *Ellenborough* delivered the unanimous judgment of the Court. "As to the second question, whether the plaintiffs upon this record, who are *British* subjects, duly competent to sue in their own persons, can, in a Court of Law, enforce by suit a policy for the benefit of another person, who was an alien enemy when the policy was effected, was so at the trial, and still is so; the negative is strongly contended for on behalf of the underwriter, on the authority of the cases of *Bristow* v. *Towers*, (*d*) and *Brandon* v. *Nesbitt*. (*e*) But it will be recollected that in those cases the party interested, and on whose behalf the suit was maintained, was an alien enemy, against whose recovery, through the medium of his *British* trustees there existed this objection, that the property to be covered by the policy belonged to an alien enemy, and that any protection afforded to such property by means of a contract of indemnity, directly and materially contravened the public interest, which was concerned in the precariousness or destruction of such property. In the present instance no such public policy of the country is contravened by sustaining and giving effect to such a trust; but on the contrary, this country, in furtherance of the same policy, which allows the granting of licenses to authorize the trade, ought to give effect to the ordinary means of indemnity, by which that trade (from the continuance of which the public must be supposed to derive a benefit) might be best promoted and secured. And although the king's license cannot, in point of law, have the effect of removing the personal disability of the trader, in respect of suit, so as to enable him to sue in his own name; it purges the trust in respect to him, of all those injurious qualities in regard to the public interest, which constituted the public ground of objection to the trust in the two cases just referred to, and which have been so much relied upon on the part of the plaintiff in error. As therefore there is in this case no legal incompetence to sue in the parties actually suing, and no public interest which stands in the way of maintaining this suit, for the benefit of

[*652] those who were the objects of the license authorizing the trade in question, it does not appear to us that the right of the assured to recover can well be resisted on that ground."

It was questioned, in *Shroeder* v. *Vaux*, (*a*) whether it was necessary, where a ship was licensed for a given time, that the whole voyage must be concluded within that time: Lord *Ellenborough* and the whole Court of King's Bench were of opinion, that it never was intended that if the adventure licensed were *bonâ fide* prosecuted within any part of the time mentioned, it should become illegal, because by some accident the voyage was protracted beyond that period. (*b*)

The same construction has been put upon those licenses in the Court of Admiralty, and Lord *Stowell* laid it down as a general rule, "that where no fraud has been committed, where no fraud has been meditated as far as appears, and where the parties have been prevented from carrying the licenses into execution by a power which they could not control, they shall be entitled to the benefit of its protection, although the terms may not have been literally and strictly fulfilled." *Good Hope*. (*c*)

The next question which comes to be considered is.—Whether it be lawful to insure the property of an enemy, when not protected by a license? Whatever doubts might formerly obtain in *England* either as to the legality or expe-

---

(*d*) 6 T. R. 35.
(*e*) 6 T. R. 23, see *post*.
(*a*) 15 East, 52.
(*b*) Freeland v. Walker, 4 Taunt. 478, and Lewis v. Cormac, 4 Taunt. 483, in notes, and see Groning v. Crockett, 3 Camp. 83.
(*c*) Edwards' Cases on Licenses, 6. See Evereth v. Tunno, 1 B. & A. 142.

diency of such insurances, the question was finally settled, as we have seen by the case of *Potts* v. *Bell*. (*d*) The late Mr. Justice *Park* seems to have thought that the question was settled by the two following cases of *Brandon* v. *Nesbitt* and *Bristow* v. *Towers*; (*e*) but it is clear that there was no direct determination of the question in these cases, having been decided on the short ground of "alienage."

*The first of those cases was *Brandon* v. *Nesbitt*, (*a*) which [*653] was an action on a policy of insurance on goods on board the *Greyhound*, an *American* ship, at and from *London* to *Bayonne:* there was an averment in the declaration that the policy was effected for the benefit and on the account of David Brandon, Isaac and David Valery, and others, who were interested in the goods; and another averment that the ship was captured as prize. The defendant pleaded that the persons in whom the interest was averred to be were aliens born, and that before the ship sailed they were become alien enemies of our king.

The second plea stated, that the persons interested were living in *France*, and enemies, and that the goods were sent from *London*, after the commencement of the war, for the purpose of being landed and delivered in *France* to the king's enemies. (*b*) The replication to the first plea stated, that the persons interested were indebted to the present plaintiff in more than the value of the goods insured. The replication to the second, that the goods insured were not prohibited at the time of the policy, and that they were shipped before the commencement of the war. To these replications there were demurrers.

Lord *Kenyon*, in giving the opinion of the Court, said, that they had considered this case, and unless anything more could be urged at the Bar to shake the opinion they had formed, they were of opinion that judgment must be given for the defendant, on this ground that an action will not lie either by or in favour of an alien enemy.

The next case of *Bristow* v. *Towers*, (*c*) which came on in the same Term, and was argued upon a special verdict, in which the only point discussed was the legality of insurances on enemy's property; and the principle of the decision in *Brandon* v. *Nesbitt* was held so clearly to control the [*654] other, that, on the authority of that decision, the counsel for the plaintiff abandoned the second argument, which the Court had ordered.

The special verdict stated that the plaintiff, on the 13th *March*, 1793, being then resident in *Great Britain*, in pursuance of an order for that purpose, caused the insurance in question to be made on account of Arrouet, Massot, &c., and that the goods insured were by the policy warranted *French* property, and were so in fact; that the goods, which consisted of buttons, buckles, &c., of the manufacture of this kingdom, were shipped on board the *Nancy*, (an *American* ship) on the 19th *March*, 1793, by Messrs. Humphreys, of *Birmingham*, in compliance with orders received in *January*, 1793, from Messrs. Arrouet, Massot, &c., who were and still are subjects of *France;* that by two orders in council of 11th *February*, 1793, general reprisals were granted against the ships, goods, and subjects of *France*, and a general embargo was laid on all vessels in *Great Britain*, but by an another order of 26th *February*, the said general embargo was declared not to extend to foreign vessels belonging to the

---

(*d*) 8 T. R. 548.

(*a*) 6 T. R. 23.

(*b*) In a plea of alien enemy the defendant must state that the plaintiff was born in a foreign country at enmity with this country, and that he is not residing here under letters of safe-conduct from the king. Casseres v. Bell, 8 T. R. 166.

(*c*) 6 T. R. 35.

(*e*) See Furtado v. Rogers, *post.*

subjects of any state in amity with his Majesty, but that they might forthwith proceed on their respective voyages, provided the cargo did not consist of naval or military stores, or any other article the exportation whereof was prohibited by any law or order of council then in force. The verdict then states the sailing of the ship on the voyage insured on the 21st of *March*, 1793, the subsequent capture of the vessel by some *English* subjects, and the condemnation of the goods insured as *French* property.

This special verdict was fully argued at the Bar, and a second argument was ordered; but, after the decision of *Brandon* v. *Nesbitt*, the counsel for the plaintiff said that he declined the further argument of the case, as he had no hopes of convincing the Court that this case could be distinguished from the principle upon which the former had been so recently determined.

[*655] *Lord *Kenyon*.—"It appears to the Court in the same light, and there must be judgment for the defendant."

In the case of *Furtado* v. *Rogers*, (*a*) it was clearly decided that all insurances upon foreign ships must be understood as virtually containing an exception in the case of *British* capture, and in this case it was held that even a *French* ship that was insured in *England*, previous to the commencement of hostilities between *Great Britain* and *France*, was not protected by the policy in the case of a loss by *British* capture, after the hostilities had commenced.

Lord *Alvanley*, in delivering the judgment of the Court, said, "There are two questions for our consideration, 1st, Whether it be lawful for a *British* subject to insure the ship of an enemy from the effect of capture made by his own government? 2ndly, Whether, if that be illegal, the insurance in this case having been made previous to the commencement of hostilities will make any difference? As to the first point, it has been understood for some years past to have been the opinion of all Westminster Hall, and, I believe, of the nation at large, that all such insurances are illegal, and incapable of being enforced in a Court of Justice. Mr. *Park* seems to consider the cases of *Brandon* v. *Nesbitt*, (*b*) and *Bristow* v. *Towers*, (*c*) as having decided the point; (*d*) but after looking accurately into all the cases, I admit there is no direct determination. The above two cases proceeded on the short ground of "alienage," which was sufficient to support the decision, without entering into the other question." His Lordship, after referring to the uncertainty of the matter which had existed for some years, and referring to the opinion of Mr. J. *Buller* (*e*) on the subject, goes on to say:—"We can only say, that although many persons have recovered in such actions, it is equally true that doubts have been entertained by many persons as to their right to recover, and that most of those who were

[*656] informed upon the subject *were firmly persuaded that the objection might have been made with success. This affords a sufficient vindication to the Courts of this country in now deciding this point against a foreigner. In the year 1748 an act (*a*) passed, prohibiting the insurance of *French* ships and goods during the war; this was, at least, a legislative declaration of the impolicy of such insurances at that time.

From the expiration of that act to the passing of the 33 Geo. 3, c. 27, s. 4, no legislative interference upon the subject ever took place, and previous to the last act, the policy in question was made. The question, then is, whether the law does not make that exception, and whether it be competent to an *English* underwriter to indemnify persons who may be engaged in war with his own sovereign against the consequences: by the terms of the policies, the under-

---

(*a*) 3 B. & P. 191.
(*b*) *Ante*, p. 653.
(*c*) *Ante*, p. 653.
(*d*) See Park Ins. 519.
(*e*) See his judgment in Bell v. Gibson, 1 B. & P. p. 354.
(*a*) 21 Geo. 2, c. 4.

writers certainly undertake to indemnify the assured against all captors and detentions of princes, without any exception in respect of the acts of the government of their own nation? We are all of opinion, on the principles of the *English* law, it is not competent to any subject to enter into a contract to do anything which may be detrimental to the interests of his own country; and that such a contract is as much prohibited as if it had been expressly forbidden by act of Parliament. It is admitted, that if a man contract to do a thing which is afterwards prohibited by act of Parliament, he is not bound by his contract: this was expressly laid down in *Brewster* v. *Kitchell:* (*b*) and on the same principle, where hostilities commence between the countries of the assured and the underwriter, the latter is forbidden to fulfil his contract.

With respect to the expediency of these insurances, it seems only necessary to quote a single line from *Bynkershoek*, (*c*) and part of a passage in *Valin.* (*d*) The former says, "Hostium pericula in se suscipere quid est aliud quam eorum maritima promovere;" and the latter, speaking of the conduct of the *English* during the war *of 1756, who permitted these insurances, says, "The consequence was, that one part of this nation restored [*657] to us by the effect of insurance, what the other took from us by the rights of war."

There is no express declaration, therefore, either for or against the legality of such insurances, and the question comes now to be decided for the first time. We are all of opinion, that to insure enemies' property was at common law illegal, for the reasons given by the two foreign writers to whom I have referred. If this be so, a contract of this kind entered into previous to the commencement of hostilities must be equally unavailable in a Court of law, since it is equally injurious to the interests of the country; for if such a contract could be so supported, a foreigner might insure previous to the war, against all the evils incident to the war. But it is said that the action is suspended, and that the indemnity comes so late that it does not strengthen the resources of the enemy during the war. The enemy, however, is very little injured by captures for which he is sure to be repaid, at some time or other, by the underwriters.

Since the case of *Bell* v. *Potts*, it has been universally understood that all commercial intercourse with the enemy is illegal at common law, and that, consequently, all insurances founded upon such intercourse are also illegal. Why are they illegal? Because they are in contravention of his Majesty's object in making war, which is by the capture of the enemy's property, and by the prohibition of any beneficial intercourse between them and his own subjects to cripple their commerce. The same reasoning which influenced the Court of King's Bench in their decision in *Bell* v. *Potts*, seems decisive in the present case. For it being determined that during war all commercial intercourse with the enemy is illegal, at common law, it follows, that whatever contract tends to protect the enemy's property from the calamities of war, though made antecedent to the war, is, nevertheless illegal. I forbear to enter into the argument suggested at the Bar, in favour of the defendant, that the law will not enforce a contract *founded on a transaction detrimental to [*658] the public policy of the state. The ground upon which we decide this case is, "that when a *British* subject insures against captures, the law infers, that the contract contains an exception of captures made by the government of his own country; and if he had expressly insured against *British* capture, such a contract would be abrogated by the law of *England.*"

(*b*) 1 Salk. 198.
(*c*) Quæst. Juris Pub. lib. 1, c. 21.
(*d*) Page 32.

So also in the case of *Kellner* v. *Le Mesurier*, (*c*) Lord *Ellenborough* says, "As to the last ground of objection to the validity of this insurance, it immediately involves this question, viz: whether an insurance made in terms against capture generally can be legally carried into effect, so as to operate as an indemnity against an act of hostile capture on the part of his Majesty and his subjects, in favour of an enemy, (for such the proprietor of this ship must be taken to be at the time of the capture in question,) the ship having been, as alleged, taken as prize by his Majesty. And, upon full consideration on the subject, we are of opinion that this last ground of objection is well founded, and that no action can be maintained upon this policy to recover the loss in question. A policy containing an insurance against *British* capture *eo nomine* would be illegal, and void upon the face of it, as being directly and obviously repugnant to the interest of the state, having an immediate tendency to render ineffectual to the extent of the indemnity created thereby all offensive operations by sea, adopted by his Majesty and his subjects, for the purpose of weakening the strength and diminishing the resources of the enemy. And if an insurance by a *British* subject, made in terms, against *British* capture would be void, an insurance indirectly producing the same effect by the application afterwards of the general words of the insurance to the particular event of *British* capture, which has since happened, must, we are of opinion, upon principle be equally, illegal; and that no peril, the subject of insurance, can be covered under the
[*659] generality of the terms *"capture," "detention of princes," or the like, which could not, consistently with law, be specifically insured in direct and express terms."

In the next case of *Gamba* v. *Mesurier*, (*a*) on the same day, Lord *Ellenborough* also delivered the judgment: the principle of the case is similar to the preceding one, viz:—"that an underwriter on *French* property in time of war, was not liable for loss occasioned by capture by the king's ships during hostilities, which commenced between *Great Britain* and *France* subsequent to the policy being made, and terminated before action brought."

And on the same day judgment was delivered by the learned Chief Justice, in the case of *Brandon* v. *Curling*, (*b*) in which case it was held by the Court, "that an insurance on goods from *London* to *Bayonne* in *France*, shipped on board a neutral ship, on account of and at the risk of *Frenchmen*, before the declaration of hostilities between *Great Britain* and *France*, but exported afterwards, could not be enforced against the underwriter, even after the restoration of peace, to recover a loss by capture of a co-belligerent (not stated to be an ally) during the war. And they held, that every insurance on alien property by a *British* subject, must be understood with this implied exception, that it shall never cover any loss happening during the existence of hostilities between the respective countries of the assured and assurer."

And not long after these cases, the case of *Lubbock and another* v. *Potts*, (*c*) came before the Court of King's Bench; and the judgment was delivered by Lord Chief Justice *Ellenborough:* and the Court held in this case that, "colonial produce could not legally be shipped from the *British West Indies* for *Gibraltar*, and therefore the same could not be insured on such a voyage." This case is mentioned for the sake of the principle contained it it, viz:—that
[*660] if a certain voyage be prohibited by the laws of this country, the *insurance upon the adventure is illegal also, and therefore void. But this class of cases which depended upon the old navigation laws, and the laws relating to the customs so entirely as to render such cases scarcely worth

(*c*) 4 East, 396.
(*b*) 4 East, 409.
(*a*) 4 East, 407.
(*c*) 7 East, 449.

referring to, after the entire alteration of the former, and annihilation of the latter at this day. (*a*)

There are, however, some matters still to be mentioned on this head: such are the laws against smuggling.

By 3 & 4 Wm. 4, c. 53, all the laws upon this subject are consolidated in that act: by which it is enacted, that every person who by way of insurance or otherwise, shall undertake or agree to deliver any goods to be imported beyond the seas into any port or place in the *United Kingdom*, without paying the duties due on such importation, or any prohibited goods; or who, in pursuance of such insurance or otherwise, shall deliver or cause to be delivered, any uncustomed or prohibited goods, and every aider and abettor of such person, shall for every such offence, forfeit the sum of 500*l.* over and above any other penalty to which he may be liable; and every person who shall agree to pay any money for the insurance or conveyance of such goods, or who shall receive or take such goods into his custody or possession, or suffer the same to be so received or taken, shall also forfeit 500*l.* over and above any penalty to which he may by law be liable. (*b*)

It would seem that if part of a cargo be illegal, and the rest of the goods, though legal, are intended to cover an illegal design, (*c*) or if the contract be entire, and cannot be severed, the illegality of the part will vitiate the whole policy. But if a portion of the subject-matter be entirely free from the illegality, and there be no fraud extending to it, the policy is divisible, and will protect the legal part of the *cargo; and therefore it was held that [*661] a cargo licensed might be insured, and the insurance of part is not vitiated, though the other part of the cargo is not licensed and illegal. (*a*)

And where a license was granted to export gunpowder, and more was exported than was specified in the license, the exportation of the excess only was held to be illegal; and therefore an insurance on the whole cargo was supported as to so much for which the license was obtained. (*b*)

But, in the case of *Parkin* v. *Dick*, (*c*) where an exportation from this country was protected by a valued policy on goods to be thereafter specified, and the specification afterwards made included some goods, the exportation of which was prohibited under the penalty of forfeiting the goods and the ship in which they were exported, the Court of King's Bench held the whole adventure to be illegal and the policy entirely void. Lord *Ellenborough* observing "it is an illegal act and subjects the ship itself to forfeiture. The policy is one entire contract on goods to be thereafter specified, to which the underwriter subscribed: and the subsequent specification by the assured cannot alter the nature of the contract with respect to the underwriters so as to sever that which was one entire contract. It has been decided a hundred times that if a party insure goods altogether in one policy, and some of them are of a nature to make the voyage illegal, the whole contract is illegal and void."

And in the case of *Camelo* v. *Britten*, (*d*) where the license was held void on account of the condition not having been complied with, although the subject-matter of the insurance consisted of various articles besides the gunpowder, still it was considered that the policy being one entire contract, it was wholly void.

(*a*) See the Navigation Act of 3 & 4 Wm. 4, c. 54. And see the act, 5 & 6 Vict. c. 47, (altered and amended by 8 Vict. c. 12,) passed 8th May, 1845.

(*b*) Sect. 47. See also 4 & 5 Wm. 4, c. 13; 4 & 5 Wm. 4, c. 189.

(*c*) See Gordon v. Vaughan, 12 East, 302. *Ante*, p. 647.

(*a*) Piescall v. Allnutt, 4 Taunt. 792. Butler v. Allnutt, 1 Stark. 222.

(*b*) Keir v. Audrade, 2 Marsh. 196. (*c*) 11 East, 502.

(*d*) 4 B. & A. 184. *Ante*, p. 647.

A sentence against a neutral by a *British* Vice Admiralty Court, is sufficient evidence from which to presume that the ship had been engaged in some illegal transaction. A neutral *meeting by agreement a *British* vessel, [*662] for the purpose of receiving gunpowder and arms, is illegal, even though the latter should have had a license to export them for the purposes of trade. (*a*)

SECTION III.

OF NON-COMPLIANCE WITH WARRANTIES.

We come now to notice another important instance in which the assured may forfeit the insurance which he has made to secure himself against the perils insured against by the underwriters, and this is where he makes an express condition or warranty of some fact or circumstance, or binds himself, that a certain condition shall happen, otherwise he is to lose the benefit of his contract. This condition by which the assured binds himself that it shall be performed, is independent altogether of the contract which I endeavoured in the first part of this Treatise to explain the principles of; and it was there said, that there was an implied condition by law, that the assured could not escape from, viz: that his ship should be seaworthy and properly equipped for the voyage; but having done that, he makes no assurance that his ship is safe at the moment of the insurance; (*b*) he is bound to give the underwriter all the account he knows of her, but, as Lord *Mansfield* says, "that although the assured ought to know whether the ship was seaworthy when she set out on her voyage, yet he may not be able to know the condition she may be in, after she has been out a twelve-month." There is also an implied condition by law, that the loss shall not happen through the fault of the assured; if his con-
[*663] duct is such as to cause either a forfeiture of the ship to *a foreign state, or to occasion the loss of it by his own act, the underwriter is not liable. But it is a very different thing where he chooses to bind himself to a condition or warranty, that something is the fact, as he represents, or that something is to be done by him. By the law of *England*, such a condition must be complied with, or it works the entire failure of the contract. Lord *Eldon*, in the case of the *Newcastle Fire Insurance Company* v. *Macmorrow*, (*a*) says:—"It is a clear and first principle of the law of insurance, that where a thing is warranted to be of a particular nature, or description, it must be such as it is stated to be. It is no matter whether it be material or not; the only question is, 'is this the thing *de facto* that I have signed.'"

And therefore it has been held in the case of *Harrison* v. *Douglass*, (*b*) that an underwriter in an action on a policy, after paying money into Court, cannot rely on a breach of warranty; for the payment admits that the assured has a right to recover something, which he could not do if there had been a breach of warranty.

So in the case of *Blackhurst* v. *Cockell*, (*c*) which was an action on a policy of insurance "on goods," from the lading of them on board the ship at *London*

(*a*) Gibson v. Mair, 1 Marsh. 39, and Gibson v. Service, 1 Marsh. 119.
(*b*) See Motteux v. London Assurance Comp. *ante*, p. 200.
(*a*) 3 Dow. 255. (*b*) 3 A. & E. 306.
(*c*) 3 T. R. 360.

to *Liverpool*," "lost or not lost:" at the bottom of the policy was added, "warranted well, *December*, 9th, 1784." At the trial before Lord *Kenyon*, at *Guildhall*, it appeared that the underwriter underwrote the policy between one and three in the afternoon, and that the ship was lost about eight o'clock that morning. A nonsuit was entered, with liberty to the plaintiff to move to enter the verdict for him: Lord *Kenyon*, "The single question is, whether the warranty at the bottom of the policy means at the time when the defendant subscribed it, or any time that day? And we are all of opinion, that if the ship be well at any time that day it is sufficient."

Buller, J.—"The nature of a warranty goes a great way to determine this question. It is a matter of indifference *whether the thing warranted be material or not; but it must be literally complied with; [*664] and if it be so, that is sufficient. Here the ship was warranted safe on the 9th of December, and there was great reason for inserting those words, because they protected the underwriter from all losses before that day; to which he would have been liable, for the policy was on the goods from the lading on board of the ship."

2. In *Pawson* v. *Watson*, (*a*) Lord *Mansfield* said.—"There is no distinction better known to those who are at all conversant with the law of insurance than that which exists between a warranty, or condition which makes part of a written policy, and a representation of the state of the case. Where it is a part of a written instrument it must be performed."

And in the same case, in answer to a question put by the counsel for the underwriters, viz: whether it was the opinion of the Court that to make written instructions valid and binding as a warranty, they must be inserted in the policy? Lord *Mansfield* answered that, "most undoubtedly that was the opinion of the Court." And in the case of *Lothian* v. *Henderson* in the House of Lords, (*b*) Mr. J. *Chambre*, says (*c*) "At the time when the agreement was made, the underwriters had by the terms of the policy a clear right to all the advantages of a warranty that the ship was *American*, it having been long settled that such a description as is contained in this policy does amount to a warranty." The description in the policy was "upon the goods and merchandises of and in the good ship called the *Catharine*, an *American* vessel." And Mr. J. *Le Blanc*, says, "it has scarcely been denied at the Bar that the terms, of this policy, 'of and in the good ship or vessel called the *Catharine*, an *American* vessel,' amount to an express warranty of the ship's being *American*, which was a neutral nation, in the war, nor could it have been otherwise contended for, after the uniform *current of authorities in which such an averment has been decided, or taken for granted to be a warranty, [*665] as much as if the word 'warranted' had been inserted in the policy, for I take this to be an established proposition that every positive averment or allegation on the face of the instrument, and making a part of the written contract, whether inserted in the body of it, or written in the margin in a line with the body of the instrument, or transversely, amounts to a warranty or condition. And if such allegation be not strictly true the assured cannot recover on the policy to whatever cause the loss be owing, whether the loss be connected with the subject of such warranty, or wholly independent of it: for it is a condition on which the contract is to take effect, which failing, the contract fails."

And this rule of law was decided in the case of *Bean* v. *Stupart*, (*a*) where the plaintiff insured the ship called the *Martha* "at and from *London* to *New York*," and on the margin of the policy were written these words "eighty

(*a*) Cowp. 787. See *ante*, p. 602, where this case is fully reported.
(*b*) 3 B. & P. 499. (*c*) Page 510.
(*a*) Doug. 11.

nine-pounders with close quarters, six-pounders on her upper decks, thirty seamen besides passengers." The ship sailed from the *Downs* on the 1st *March* and on the 10th was taken by an *American* privateer and was sent to make the port of *Boston*. On the 30th *May*, the plaintiff brought this action against the defendant, on which the defendant paid the premium into Court, and pleaded the general issue. The cause was tried before Lord *Mansfield*, and a special jury at *Guildhall*, at the Sittings after Trinity Term, 18 Geo. 3; the defence set up was, that there were not thirty seamen on board the ship according to the stipulation in the margin of the policy: and, in fact, it appeared from the evidence that to make up that number the plaintiff reckoned the steward, cook, surgeon, some boys and apprentices, and some persons learning to be seamen; and only twenty-six persons had signed the ship's articles. It also appeared that there were seven or eight passengers on board.

[*666] *Lord *Mansfield* observed, in summing up to the jury, that the import of the words must be collected from the subject to which they are applied. That if, in the present case, the assured had stipulated for thirty seamen besides boys and landsmen, it would have been clear that the terms had not been complied with; but that in this policy seamen were contrasted with passengers, and, in that sense, the words seemed to include boys as well as men: but he left the construction to the jury. The jury found a verdict for the plaintiff as for a total loss; the defendant obtained a rule to shew cause why there should not be a new trial. On the day for shewing cause, Lord *Mansfield*, after reporting the facts as above stated, and that he had left the construction of the word "seamen," to the jury, observed, that he thought there was little doubt on the question after what had passed in the case of *Pawson* v. *Ewer*. That the warranty might have been so worded as only to include able seamen; but that, as expressed here, the contrast being with passengers, the whole of the ship's crew or ship's company appeared to be meant. That was the general maritime sense of the word. After argument at the Bar: Lord *Mansfield*—"The whole argument for the defendant turns upon begging the question. There is no doubt, but that this is a warranty. Its being written on the margin makes no difference. Being a warranty there is no doubt but the underwriter would not be liable, if it were not complied with: because it is a condition on which the contract is founded. But the question is, whether in this warranty the word "seamen" was used in the strict literal sense or not. If it was, the warranty has not been complied with. It is a matter of construction. Boys are reckoned seamen, not only at the Custom-house, and *Greenwich* hospital, but in the distribution of prizes. The special jury and bye-standers were perfectly clear, they hardly seemed to think it a serious question in this cause. There is scarcely now such a thing as a ship entirely manned with seamen strictly so called. Even on board the king's ships they are satis-

[*667] fied with a few strict seamen, and able-bodied *landsmen make up the rest of the crew. I had no doubt of the sense of the word in this policy, and the jury decided it."

In an action tried before Lord *Mansfield*, of *Pawson* v. *Barnevelt* at *Guildhall*, (*a*) the counsel for the defendant offered to produce witnesses to prove that a written memorandum inclosed in the policy was always considered as part, but Lord *Mansfield* said that it was a mere question of law, and would not hear the evidence; but decided that a written document did not become a strict warranty by being folded up in the policy. And see the case of *Bize* v. *Fletcher*, at *Guildhall*, Easter Vac. 1779. (*b*) But if a policy refer to certain

(*a*) Trin. Vac. 1779, Doug. 12, in the notes.
(*b*) Doug. 12, in the notes. *ante*, p. 608.

printed proposals the proposals will be considered as part of the policy, *Worsley* v. *Wood* in error. (*c*) See also *Rutledge* v. *Burrell*. (*d*)

And in the case of *Graham* v. *Barras*, (*e*) where a ship was warranted not to sail "foreign" after the times limited by certain club rules; the rules or warranties of the club limited the times of sailing to different parts of the world, and by one of the rules it was provided that vessels might sail after the limited times, on payment of an additional premium, as per scale; and by another rule every member of the club, before the commencement of each voyage, was to give his acceptance for the premium, and parties neglecting to give notice were subject to a penalty: it was held (assuming that these rules could be incorporated with the policy) that a party whose ship had sailed too late, and been lost, could not afterwards obtain the benefit of the extended time, by submitting to the penalty, and paying the extra premium.

In the case of *Kenyon* v. *Berthon*, (*f*) the following words were written on the margin of the policy:—"In port 20th of *July*, 1776." In fact, the ship had sailed on the 18th of *July*. The question was, whether this marginal note was a warranty or a representation?

*Lord *Mansfield*.—"The question is, whether the ship's being in port on the 20th is part of the condition of the instrument? [*668] When it is on the face of the instrument, it is a part of the policy: so that here, if the ship was not in port, it is no contract. As to its being only in the margin, that makes no difference: it is all part of the contract, when it is once signed. And though the difference of two days may not make any material difference in the risk, yet as the condition has not been complied with, the underwriter is not liable."

3. The propriety of these decisions has never been questioned, and the rule has been constantly and tacitly acquiesced in from the time in which these cases were determined till the year 1786, when, notwithstanding the uniformity of the determinations upon the subject, it once more became an object of discussion in the case of *De Hahn* v. *Hartley*. (*a*)

It came before the Court upon a special verdict; it was an action of assumpsit brought by the plaintiff (an underwriter) against the defendant, to recover back the amount of a loss which he had paid upon a policy of insurance. The defendant pleaded the general issue. The cause came on to be tried before Mr. Justice *Buller* at *Guildhall*, when the jury found a special verdict, stating:

That the defendant, on the 14th of *June*, 1779, gave to his insurance broker instructions in writing, to cause an insurance to be made on a certain vessel, called the *Juno*. (Then the instructions are set out in the verdict, signed by the defendant.) The verdict then states, that the broker, in consequence of such instructions, on the said 14th of *June*, 1779, did cause a policy of insurance to be made on the *Juno*, upon goods and merchandises laden on board, and also on the ship, at and from *Africa*, to her port or ports of discharge in the *British West Indies*, at and after the rate of 15*l*. per cent. The verdict, after reciting two memorandums, not material, then proceeded to state, that in the margin of the said policy *were written the words and figures following:—"Sailed from *Liverpool* with fourteen six-pounders, [*669] swivels, small-arms, and fifty hands or upwards: copper sheathed." That the plaintiff underwrote the policy for 200*l*. at a premium of 31*l*. 10*s*. That the *Juno* sailed from *Liverpool* on the 13th of *October*, 1778, having then only

(*c*) 6 T. R. 710.
(*d*) 1 H. Black. 254.
(*e*) 5 B. & Ad. 1011.
(*f*) Mich. Vac. 1779; Doug. 12, note (4), and see Colby v. Hunter, Moo. & M. 81.
(*a*) 1 T. R. 343.

forty-six hands on board her, and arrived at *Beaumaris*, in the Isle of *Anglesea*, in six hours after her sailing from *Liverpool*, with the pilot from *Liverpool* on board her, who did pilot her to *Beaumaris*, on her said voyage; and that at *Beaumaris* the *Juno* took in six hands more, and then had, and during the said voyage, until the capture thereof, continued to have fifty-two hands on board her. That the said ship in the voyage from *Liverpool* to *Beaumaris*, until and when she took in the said six additional hands, was equally safe, as if she had had fifty hands on board her for that part of the voyage. The verdict then states, that the defendant was interested, and that the ship was captured; that on receiving an account of the loss of the vessel, the plaintiff paid to the defendant the sum of 200*l.*, not having then had any notice that the said ship had only forty-six hands on board her when she sailed from *Liverpool*.

For the defendant it was said, that this representation had no relation to the voyage insured, for that was at and from *Africa*, &c., whereas this is merely an account of the state of the ship at *Liverpool*.

Lord *Mansfield*.—"There is a material distinction between a warranty and a representation. A representation may be equitably and substantially answered; but a warranty must be strictly complied with. Supposing a warranty to sail on the 1st of *August*, and the ship did not sail till the 2nd, the warranty would not be complied with. A warranty in a policy of insurance, is a condition or a contingency, and unless that is performed there is no contract. It is perfectly immaterial, for what purpose a warranty is introduced; but being inserted, the contract does not exist unless it is literally complied with. Now in the present [*670] case, the condition was, *the sailing of the ship with a certain number of men, which not being complied with, the policy is of no effect."

Mr. Justice *Buller*.—"It is impossible to divide the words written in the margin, in the manner which has been attempted at the Bar, that that part which relates to the copper sheathing should be a warranty, and not the remaining part. But the whole forms one entire contract, and must be complied with throughout." Judgment for the plaintiff. A writ of error was brought in the Exchequer-chamber upon this judgment, which, after two arguments, was affirmed by the unanimous opinion of the eight Judges composing that Court. (*a*)

Having stated those rules which apply to warranties in general, it will now be proper to consider the several kinds of warranties, and those principles which are peculiar to each species, confirmed by decisions of the Courts. Those which most frequently occur in our books of reports, and upon which the greatest questions have arisen, may be reduced to three classes: warranty as to the time of sailing, warranty as to convoy, and warranty of neutrality. Of each of these we shall treat; observing, in the first place, that those rules which are applicable to warranty in general, most necessarily also apply to each of these individually.

I. First, as to the time of sailing.

1. Thus in the case of *Hore* v. *Whitmore*, (*b*) which was an action on a policy of insurance, upon a motion to set aside the verdict which had been given for the plaintiff, the case appeared to be this. The declaration stated that a policy was made on the ship *New Westmoreland*, at and from *Jamaica* to *London*, warranted to sail on or before the 26th of *July*, 1776, free from capture, and free from all restraints and detainments of kings, princes, and people of what nation, condition, or quality soever. It further stated that the

(*a*) Mich. Term, 1787, 28 Geo. 3; 2 T. R. 186.
(*b*) Cowp. 784.

said ship was prepared and ready to sail, and would have sailed on the 25th of *July*, on her intended voyage, if she had not *been restrained by the order and command of Sir Basil Keith, the then governor of *Jamaica*, and detained beyond the day: that she afterwards sailed and was captured. For the plaintiff it was said, that the usual clause against the detention of rulers and princes being inserted in this policy, the embargo, by which the ship was prevented from sailing on the day mentioned in the warranty, came expressly within the meaning of it, and, therefore, excused the delay. [*671]

On the other hand it was said, that the loss of the ship could in no possible respect be connected with the embargo. That the warranty was positive and express: that the ship should depart on or before the day appointed, and, therefore, must be complied with. Of this opinion was the Court; and accordingly the rule to set aside the verdict for the plaintiff, and to enter a nonsuit, was made absolute.

2. But the necessity of a punctual adherence to the day on which the ship is warranted to sail by the policy, is not peculiar to the law of *England:* for we find that foreign writers declare, that the same rule is universally adopted. (*a*) If, say they, the owner of the ship or goods has said in the policy, that he will be ready to sail at a particular time, at which, perhaps, the navigation may be less dangerous; and on this account the insurer is more easily induced to underwrite the policy; and he afterwards delay the time of sailing, and the ship and goods perish, the underwriter is not bound, for he who neglects to depart at the appointed time, must, if he sail at a subsequent period, do it entirely at his own risk. (*b*)

3. If the warranty be to sail after a specific day, and the ship sail before, the policy is equally avoided as in the former case; because the terms of the warranty are as much departed from in the one case as in the other.

This was decided in the case of *Vezian* v. *Grant*, (*c*) on *the 8th of *December*, 1777, a policy was underwritten by the defendant on goods in a *French* ship, *Le Compte de Trebon*, "at and from *Martinico* to *Havre de Grace*, with liberty to touch at *Guadaloupe;* warranted to sail after the 12th of *January*, and on or before the first of *August*, 1778." The insurance was made by the plaintiff on account of Jacques Harteloupe and Louis de Lamare, of *Havre de Grace*, owners of the ship and cargo; at which time it was not known whether she would load at *Martinico* or *Guadaloupe*, they having goods to come from both places; the policy was therefore intended to cover the risk from both, or either of them. The ship, having finished her outward voyage at *Martinico*, sailed from thence on the 6th of *November*, 1777, for *Guadaloupe*, where she took in her whole loading, without returning to *Martinico*, which the captain intended to do, had he not got a complete cargo at *Guadaloupe;* from whence she sailed on the 26th of *June*, 1778, and was taken on the 3rd of *September*. The plaintiff demanded payment of the loss from the underwriters, which being refused, he brought actions against them for the recovery thereof. This cause came on to be tried at *Guildhall*, before Mr. Justice *Buller*, when the defendant's objections were, that according to the words of the policy, the voyage was to commence from *Martinico*, and not from *Guadaloupe*, and that the warranty of the time of sailing was not complied with, the ship having sailed from *Martinico* before the 12th of *January*, 1778, to wit, on the 6th of *November*, 1777. The jury, under the direction of the [*672]

(*a*) Roccus, Not. 38.

(*b*) Roccus, in this passage, quotes the work of Santerna, upon insurances, who, he observes, "exclamat contra magistros navium, et nautas quando detinentur in portu a mulierculis, vel dulcedine vini."

(*c*) Before Mr. J. Buller, Guild. East. Vac. 1779. Park Ins. 670.

learned Judge, were of that opinion, and accordingly found a verdict for the defendant.

But as in the case of *Bond* v. *Nutt*, (*a*) when a ship is warranted to sail on or before a particular day, if she sailed from her port of loading, with all her cargo and clearances on board, to the usual place of rendezvous at another part of the same island, merely for the sake of joining convoy, it is a compliance [*673] with the warranty, though she be afterwards *detained there by an embargo beyond the day. The ground is, that when a ship leaves her port of loading, when she has a full and complete cargo on board, and has no other object in view but the safest mode of sailing to her port of delivery, her voyage must be said to commence from her departure from that port. (*b*) If, indeed, her cargo was not complete it would not have been a commencement of the voyage.

This was an action on a policy of insurance upon the ship *Capel*, in the *West India* trade, lost or not lost, at and from *Jamaica* to *London*, warranted to have sailed on or before the first of *August*, 1776. The policy was effected on the 20th of *August*, 1776, at a premium of fifteen guineas per cent. to return five per cent. if the ship departed with convoy; and eight per cent. if with convoy for the voyage, and arrived safe. At the trial, there was no controversy about the facts; and they are shortly these: the ship was completely laden for her voyage to *England*, at *St. Anne's*, in *Jamaica*, and sailed from *St. Anne's Bay*, on the 26th of *July* for *Bluefields*, in order to join the convoy there, *Bluefields* being the general place of rendezvous for convoy on the *Jamaica* station, like *Spithead* in *England*, and where a convoy then lay, which was expected to sail for *England* every day: but the greater part of the way from *St. Anne's* to *Bluefields* is out of the direct course of the voyage from *St. Anne's* to *England*. That she arrived off *Bluefields* on the 28th or 29th of *July*, where she was immediately stopped by an embargo laid on all vessels being in any part of *Jamaica*, and was detained there till the 6th of *August*, when she sailed with the convoy for *England*, but afterwards, being separated in the passage, was taken by an *American* privateer. Upon these facts the jury found a verdict for the defendant. When this case was first argued at the Bar, two points were relied upon for the defendant, in support of the verdict, which the jury had given in his favour: 1st, That the departure [*674] from *St. Anne's* was not a departure from *Jamaica*, within the meaning of *the policy. 2ndly, If it were, that the going to *Bluefields* was a deviation. Upon the first argument, Lord *Mansfield* said:—One point now started is entirely new: that supposing the voyage to have begun from *St. Anne's* that going to *Bluefields*, (which, it is admitted on all hands, was out of the course of the voyage,) though for the purpose of convoy only, shall be considered as a deviation. In answer, it has been said by the counsel for the plaintiff, that there are cases in which the contrary has been held: but they are not cited. I could wish therefore that these cases might be particularly looked into, and this ground mentioned again. It is a very material point: but widely different from a warranty to depart on a particular day, which is a condition precedent that admits of no latitude.

The second point was again argued; and then the Judges severally mentioned their ideas upon the subject, without coming at that time to any decision.

Lord *Mansfield*.—"I am extremely glad this motion has been made; the cause came on at *Guildhall*, by the candour of the parties in the fairest manner. But I had no intimation of its being a cause of consequence till after the verdict;

(*a*) Cowp. 601.
(*b*) Cowp. 603; and Graham v. Barras, 5 B. & Ad. 1011.

when I was informed 100,000*l.* depended upon it. The question was fairly tried, and the case has been very well argued on both sides. I have thought much of it since the trial. Some things are clear, and there are others which require consideration. The policy was made on the 20th of *August*, 1776, upon the contingency of a fact, which must have existed one way or the other at the time the policy was underwritten. That contingency was, that the ship should have sailed on or before the 1st of *August;* consequently, it must have taken place or not upon the 20th of that month. The port, from whence the ship was to be insured, was, if I may use the expression, the whole island of *Jamaica:* but from which of the ports the ship would sail, neither party knew: therefore they have used the words, 'at and from *Jamaica:*' by force of which she certainly was protected in going from port to port, and till she sailed. It follows, that *the word 'sailed' in the warranty; must mean that she had sailed on her homeward-bound voyage. The question [*675] then is a matter of fact; and one that admits of no latitude, no equity of construction, or excuse. Had she or had she not sailed on or before that day? That is the question. No matter what cause prevented her; if the fact is, that she had not sailed. though she stayed behind for the best reasons, the policy was void: the contingency had not happened; and the party interested had a right to say, there was no contract between them. Therefore what was said in argument is very true: if she had been prevented by any accident from sailing till the 2nd of *August*, as by the sudden want of any necessary repair, or if an enemy had been at the mouth of the port; the captain would have done very right not to sail, but there would have been an end of the policy. It is very different from the cases where a voyage has been begun; there the usage of the voyage may justify going a little out of the direct course. This also is clear; if the ship had broken ground, and been fairly under sail upon her voyage for *England* on the 1st of *August*, though she had gone ever so little way, and had afterwards put back from the stress of weather, or apprehension from an enemy in sight, or had then been put under an embargo, and had been detained till *September*, it would still have been a beginning to sail; and the stoppage would have come too late; because the warranty was upon a fact antecedent. Such a case happened before me a day or two after the present action was tried. (*a*) It was an insurance upon a ship from *Grenada* to *London*, warranted to sail on or before the 1st of *August*. She had barely begun to sail on the day, when she was stopped by an embargo, and detained beyond the time. I thought the voyage was begun; the jury were of that opinion: and there has been no motion for a new trial. I am giving no opinion, only breaking the case. Here the whole question turns upon this: Did the voyage from *Jamaica* homeward begin from *St. Anne's*, or *from *Bluefields?* Perhaps where a voyage is once begun, the going a little out of the [*676] way to join convoy may be very reasonable, and for the benefit of all parties: but still it does not vary the fact of sailing. Here it was very reasonable: but the question, whether the voyage began from *St. Anne's* or *Bluefields*, still remains. Another material circumstance arises from the words, 'at and from *Jamaica.*' At the trial I reasoned thus: 'By the terms of the policy she was protected during her stay at *Jamaica:* by force of them, she had a right to go to any port, or all round the island; and she went to *Bluefields* for reasons best known to herself. Therefore the voyage began from *Bluefields.*' Had the insurance been at and from the port of *St. Anne's*, it did strike me that going round the island to *Bluefields*, would have been a deviation. But this is a question of so much value and consequence, that the Court wishes to consider the case thoroughly, before they give a final decision upon it."

(*a*) Thellusson v. Fergusson, at Guild. Hil. Vac. 1777.

The Court took further time to deliberate; and then their unanimous opinion was pronounced by

Lord *Mansfield*.—"We are all satisfied that the truth of the case is, that the voyage from *Jamaica* to *England* began from *St. Anne's*. That when the ship sailed from *St. Anne's*, she had no view or object whatsoever, but to make the best of her way to *England*. That the value of this question, admitted on both sides, shews, that every other ship, under the same circumstances, looked upon the touching at *Bluefields*, where the convoy then lay ready, to be the safest course of navigation from *Jamaica* to *England;* and that it would have been unwise and imprudent for any ship not to have touched there. The great distinction is this: that she sailed from *St. Anne's* for *England* by way of *Bluefields;* and that it was not a voyage from *St. Anne's* to *Bluefields* with any object or view distinct from the voyage to *England*. If she had gone first to *Bluefields* for any purpose independent of her voyage to *England*, to have taken in water, or letters, or to have waited in hopes of convoy coming there, none being ready, that would have given it the condition of one voyage [*677] from *St. Anne's* to *Bluefields;* and another from *Bluefields* to *England*. (*a*) But here, under all the circumstances, we think she had no other object than to come directly to *England* by the safest course." Therefore the rule for a new trial was made absolute.

A few years afterwards a similar decision was made, (*b*) and the only difference between the cases was this, that in the case now to be mentioned, it was a condition inserted in one of her clearances, that she should pass by the place (at which she was detained by the governor beyond the day named in the warranty) to take the orders of government. But this was not thought sufficient to induce the Court to depart from the decision in *Bond* and *Nutt;* especially as in this case, the place where the ship was detained was in the direct course of the voyage.

It was an action on a policy of insurance on the *French* ship *L'Aimable Gertrude*, "at and from *Guadaloupe* to *Havre*, warranted to sail on or before the 31st of *December*." It was tried before Lord *Mansfield*, when a verdict was found for the plaintiff. A motion having been made for a new trial, the case, from his Lordship's report, appeared to be as follows:—The ship took in her complete lading and provisions for *France*, and all her clearances and papers, at a port called *Pointe a Pitre*, in the island of *Guadaloupe*, and sailed from thence on the 24th of *October*, for *Basseterre*, where there is no port, but only an open road. The town of *Basseterre* is the residence of the *French* governor. The ship arrived there at night, when the captain went on shore, and next day waited on the governor, who would not permit him to depart, and, to prevent it, took his ship's papers from him. At this place he was detained with his ship till the 10th of *January*, when he set sail with a convoy, which had arrived some little time before, and, being separated after some days from the convoy, the ship was taken by an *English* vessel. The captain, [*678] who was the only witness produced at the trial, *swore that notice had been given on the part of the governor, some days before he sailed, to him and the other captains of ships at *Pointe a Pitre*, who were preparing to sail for *Europe*, that a convoy was expected to be at *Basseterre*, from *Martinico*, on the 25th of *October*, and that, in consequence of this intimation, he had worked night and day to get ready, and had paid extraordinary gratifications to obtain the ship's papers and clearances as soon as possible; that the desire of being in time for the convoy was the only reason for this haste; and that, although he was not able to sail till the 24th, he was still in

(*a*) Wright v. Shiffner, 11 East, 515; 2 Camp. 247.
(*b*) Thellusson v. Fergusson, Doug. 361.

hopes of being in time for the convoy, as he thought it might very probably have been detained at *Martinico* some days beyond its time. The last ship papers which he received at *Pointe a Pitre* was *Le Rôle d'Equipage*, or the muster-roll. This paper, which was much relied upon by the counsel for the defendant, was dated the 24th of *October*, and was in the following words:—"*Vu par nous, chargé du detail des classes au department de la Grande terre Guadaloupe, l'equippage denomme au rôle des autres parts a nombre de vingt personnes, le capitaine compris. Permis au Sieur Jean Jacques Lethuillier, commandant le navire L'Aimable Gertrude du Havre, de s'en servir pour faire son retour, au dit lieu, passant a la Basseterre pour y prendre les ordres du gouvernement en observant les ordonnances et reglemens de la marine.*" Under this there was written, on the same paper, an account, dated the 30th of *October*, of some changes in the number of the crew, and under that the following entry:—"*Vu par nous, ecrivain de la marine chargé du detail des classes, les vingt cinq personnes existantes au present rôle, le capitaine compris. Il est permis au Sieur Lethuillier commandant le navire L'Aimable Gertrude, du Havre, de fair son retour au dit lie en se conformant aux ordonnances et reglemens royaux de la marine. A Basseterre Guadaloupe, le 2 Janvier*, 1799." On another paper, called *Le Congé*, dated the 16th of *October*, which was read on the part of the plaintiff, there was written at the bottom as follows:—"*Vu de relache a la Basseterre Guadaloupe, *pour y attendre un convoi pour France. Ce* 28 *October*, 1778. *Monentheill.*" [*679] The captain swore that he understood the only reasons for the condition in the muster-roll that he should go to *Basseterre* were, the convoy was to be at that place, and that he might take such despatches as were ready for *Europe*. He had not objected to it; because, in the regular course of the voyage to *France* from *Pointe a Pitre*, he must have gone that way, close under the guns of *Basseterre*, in order to avoid *Montserrat*, there being no other road except they were to keep quite to the leeward, which is not the custom. If he had arrived there in the day-time, he would not have cast anchor, but would have sent his boat for the despatches; but having arrived at night, his ship had been detained, contrary to his intention and expectation. The defendant's counsel, to invalidate the captain's testimony, besides the muster-roll and the entry under it, as above stated, read the protest made by the captain on his arrival at *Dover*, and also his deposition in answer to the 29th interrogatory in the proceedings in the Admiralty, on the condemnation of the ship. The words of the protest, on which they relied, were as follows:—"Whereupon he (the captain) waited on the proper officer at *Pointe a Pitre* for his muster-roll, and was by him informed it could not be granted, but on condition that he should first sail to *Basseterre*, and there wait the direction of the general of the island." And in a subsequent part, "Whereupon at his (the captain's) instance, the said John Nicholas Lethuillier, his father, came to *Basseterre*, and went with Messrs. Gobert and Botuel, commissioners of commerce, to the superintendent, and also to the general of the island, stating to them that the said ship and cargo were insured upon condition that she should have departed from the island of *Guadaloupe* before the 31st of *December*, the terms of which insurance they judged it essential to fulfil; notwithstanding which they were still refused permission to depart, and were kept there until after the 31st of *December*." The deposition relied upon was as follows:—"At the time the ship was first pursued and taken *she was steering her course towards *Brest*. Her course was not altered upon [*680] the appearance of the vessel by which she was taken. Her course was at all times, when the weather would permit, directed to *Brest*, for which port she was directed to sail, although the destination was for *Havre de Grace*, by the ship's papers. She was not, before nor at the time of the capture, sailing

beyond or wide of *Havre de Grace*. She was then about eight leagues west of *Ushant*, and her course was not altered to any other port or place, but was obliged to be directed to *Brest*, in consequence of the orders he had received, subsequent to the delivery of the ship's papers." In answer to the 27th interrogatory, his deposition was, "That all the ship's papers found on board were true and fair, and none of them false and colourable." At the trial, the captain swore that he had received directions to keep in the course to *Brest*, at *Basseterre*, from his father, who had formerly commanded the ship, but this was done as the safest way, in time of war, of getting to *Havre*, which still continued to be the place of the ship's destination. Upon this evidence the defendant's counsel made two objections, as grounds for a new trial,—1st, That there had been no inception of the voyage on the 24th of *October*, nor till after the 31st of *December;* 2ndly, that the ship never sailed on the voyage insured, viz: from *Guadaloupe* to *Havre*, but on a voyage from *Guadaloupe* to *Brest*. (*d*) After both these points had been fully argued at the Bar,

Lord *Mansfield* said.—"In my apprehension, there is no contradiction between the parol evidence, and the protest and depositions. This captain had never heard of the case of *Bond* and *Nutt*. Under an insurance at such a place as *Guadaloupe* and *Jamaica*, the ship is protected in going from port to port in the island. But the question here is, whether the voyage was *bonâ fide* commenced, and stopped by accident? As to the condition about taking the orders of government, the ship could not sail from any part of [*681] the *island without the governor's leave. But the captain, when he left *Pointe a Pitre*, expected to meet a convoy at *Basseterre*, and to proceed immediately without interruption. A convoy had been published, and he certainly would have gone to *Basseterre*, at any rate, independent of the clause in the muster-roll. With regard to the second point, the voyage to *Brest* was, at most, but an intended deviation not carried into effect."

Mr. Justice *Buller*.—"The case in 1777, between the same parties, is in point. (*a*) There was no embargo there, nor in the present case, when the ship sailed. There must be a lawful *bonâ fide* sailing, which, I think, there was in this case. The ship was completely ready in all respects."

The rule for a new trial was, therefore, discharged.

The judgment given in the last cause was not satisfactory to about twenty other underwriters on the same policy, nineteen of whom obtained leave to consolidate their different causes upon the usual terms, in order to bring the question once more into Court. Accordingly, in the ensuing Sittings, the cause was set down for trial. It was the case of *Thelluson* v. *Staples*. (*b*) In this cause, the second point as to the deviation was abandoned; and on the first, the same evidence was given as upon the former occasion. The point was again fully argued for the defendant.

Lord *Mansfield*.—"The single question on this policy is, whether the ship sailed on her voyage to *Havre* before the 31st of *December?* She certainly sailed from *Pointe a Pitre* completely loaded before that time. The doubt on the first question of this sort was this; the policy was "at and from *Jamaica;*" now the word *at* certainly comprises the whole island, and, under that word, you may sail from one port to another every where along the coast of the island. The ship, therefore, in that sense, was still at *Jamaica*, [*682] after she had got to *Bluefields*. She did not leave *Bluefields* *till after the day named in the warranty, and that place was quite out of the course

(*d*) *Ante*, p. 675.

(*a*) See Lord Mansfield's opinion in Bond v. Nutt, where he quotes the case alluded to, *ante*, p. 675.

(*b*) Sit. at Guild. Easter Vac. 1780. Park Ins. 681.

of navigation from *St. Anne's* to *England*. I own at the trial, I thought the voyage to *England* did not commence till the ship sailed from *Bluefields*, and, according to my opinion then, a verdict was found for the defendant. But there was a doubt. I therefore wished (as I always do in such cases) that the opinion of the Court might be taken in order to settle the point. The case, when it came on in Court, was very ably argued; I was completely convinced, and the Court were unanimously of opinion, that the voyage to *England* began when the ship sailed from *St. Anne's;* and upon the second trial, the plaintiff had a verdict. *Earle* and *Harris* was still a stronger case. There an embargo was actually published, before the ship sailed, and the captain, immediately after crossing the bar, returned to make a protest, and sent his ship knowingly into the embargo: but he swore that he expected the embargo was to be taken off, and that he should proceed immediately upon his voyage; and the jury believed him. (*a*) In this case to go by steps. There was public notification of a convoy to be at *Basseterre* on the 25th of *October*. The captain thought that it might be stopped a day or two at *Martinico*, and that he should get to *Basseterre* in time. He worked night and day, paid double fees for his papers, and sailed with full expectations of pursuing his voyage directly. He knew of no embargo, and *Basseterre* was directly in his road. In that respect, this case differs strongly from *Bond* v. *Nutt*. He was even in the regular voyage obliged to pass under the cannon of *Basseterre*. He had his muster-roll, on condition of calling there: but he made no difficulty of taking it on that condition, because he knew he must pass that way at all events. Did he not *bonâ fide* begin his voyage? He certainly had no idea, when he sailed from *Pointe a Pitre*, of meeting with any stop. So it was in the former case of *Thelluson* v. *Fergusson*. (*b*) There was no idea of the embargo in that [*683] case, when the ship sailed. Here there is not the least suspicion of fraud. This captain certainly did not know of the decision in *Bond* v. *Nutt*. He thought, when he was detained at *Basseterre* beyond the 31st of *December*, that the policy was forfeited, which is a strong circumstance in the plaintiff's favour, for it shews that the sailing was not colourable. This question has undergone the consideration of a special jury and of the Court. Underwriters have a right to litigate questions which seem to them to be in their favour. But, at least, there should be an end of litigation. If you should be of the same opinion with the former jury and the Court, you will find for the plaintiff:" which they did accordingly. The cause of the twentieth underwriter, on the same policy, who refused to consolidate, stood next in the paper for trial; but upon the above verdict being given, his counsel consented that a verdict should also be entered against him.

But in the case of *Moir* v. *Royal Exchange Assurance Company*, (*a*) where the warranty is to depart on or before a given day, she must be actually out of her port, and it is not enough that she break ground and commence her homeward voyage, so as to have satisfied a warranty to sail, and the Court afterwards refused to grant a new trial. This case afterwards came on before the Court of Common Pleas on a special case, and after it had been fully argued, the Court agreed with the King's Bench. And in the case of *Ridsdale* v. *Newman*, (*b*) where a ship was insured at and from *Portneuff* to *London*,

---

(*a*) Earle v. Harris, at Guild. Hil. Vac. 1780. Park Ins. 682.

(*b*) The Grenada case, *ante*, p. 675.

(*a*) 4 Camp. 84, and see 1 Marsh. 570.

(*b*) 3 M. & S. 456. And in Nelson v. Salvador, Moo. & M. 309, it was held that a warranty to sail "on or before a particular day," was not fulfilled if the ship did not completely unmoor on that day, though she had then her cargo on board, and being quite ready to sail, was only prevented by stress of weather.

warranted to sail on or before a given day, dropping down from *Portneuff* to *Quebec* with an incomplete crew, and without her clearances, which she could only obtain at *Quebec*, is not a compliance with the warranty, as she did not sail from *Quebec* till after the day.

[*684] *The construction which is put upon the word "sail" in certain instances, was fully considered in the Court of King's Bench in the recent case of *Lang and others* v. *Anderdon*. (*a*) It was an action on a policy on goods "at and from *Demerara* to *London*, warranted to sail from *Demerara* on or before the 1st of *August*, 1823." The only question was, whether the warranty had been complied with. The ship having taken in all her cargo and obtained her clearances, sailed from the town, which is on the bank of the river, about one at noon on the 1st of *August*, passed the fort, and anchored the same day about two miles beyond the port. She anchored there by the advice of the pilot, and he being unwilling to sail again at the night tide, she lay there for twenty-four hours, and proceeded on her voyage, upon which she was afterwards lost. There is a shoal about ten or twelve miles from the fort, at the outside whereof large inward-bound vessels heavily laden usually anchor, and put out part of their cargo, and large vessels outward-bound usually anchor and complete their cargo. The pilots usually leave vessels outward-bound after passing this shoal. From these facts it was contended by the defendant, that the words "sail from" were of the same import as "depart," and that the vessel had not sailed from *Demerara* on the 1st of *August* within the meaning of the warranty. A verdict was found for the plaintiffs. A rule *nisi* having been obtained on a subsequent day, the judgment of the Court, after considering the question, was delivered by *Abbott*, C. J.—"It is clear that a warranty to sail, without the word 'from' is not complied with by the vessel's raising her anchor, getting under sail, and moving onwards, unless at the time of the performance of these acts she has every thing ready for the voyage, and such acts are done at the commencement of it, nothing remaining to be done afterwards. This appears from the cases of *Bond* v. *Nutt*, and *Ridsdale* v. *Newnham*. And if it had been necessary for

[*685] the ship in question to take in a part of her cargo at *the outside of the shoal, she would not only not have sailed from *Demerara* within the meaning of this warranty, but would not even have sailed within the meaning of the other warranty to which I have alluded. It was contended, that the words 'from *Demerara*' must have the same sense in every case, and must therefore be construed to mean 'sail from the outside of this shoal,' that is, from the place at which some vessels take and unload a part of their cargo, for otherwise one vessel might be said to sail from *Demerara* before she had arrived at that part of the sea from which another vessel must depart before she could be said to sail from *Demerara*. And if that part of the sea which lies at the outside of the shoal was, in a general and popular sense, part of *Demerara*, this argument might prevail. But the fact appears to be otherwise. For whether we take *Demerara* to be the name of a province, as it is, or of the river which is sometimes called the river *Demerara*, though perhaps more properly the river of *Demerara*, we think no person speaking in popular language would say that a ship, being at the outside of this shoal, at a distance of ten or twelve miles from land, was at *Demerara*. It appears in the present instance, that large vessels heavily laden usually anchor at the outside of the shoal, and take in part of their cargo there. In the case of such a ship, therefore, goods so laden may be considered as laden at *Demerara*, by reason of the usage; and in such a case a ship would not be said to have sailed until she

(*a*) 3 B. & C. 495.

had completed her lading and quitted that part of the sea. In the case of such a ship, the taking in part of her cargo there will be like the taking in a part at the outside of the bar at *Oporto*, which was held to be within the protection of a policy, by reason of the usage in *Kingston* v. *Knobbs*. (*a*) But the proper effect of such a usage will not extend beyond the instances that fall under the usage. If in the present instance the outside of this shoal had been part of the port of the ship's departure, or in any popular and *general sense a part of *Demerara*, we should (as I have before intimated) [*686] have thought the warranty not complied with; but we cannot say that the warranty has not been complied with in this case, merely because it would not have been complied with in the case of some other ship which might have intended to take a part of her cargo at the outside of this shoal. And our decision has not the effect of attributing two meanings to the name *Demerara*, but it is only in conformity to the authorities and distinctions as to the meaning of the word 'sail,' and to that extension which may be given to the words of a policy by usage in particular instances."

A similar rule of construction was adopted in a more recent case. (*b*) The plaintiff effected an insurance on freight on the ship *Perseverance*, subject to the rules and regulations of a certain association, at *North Shields*, one of which was that vessels should not sail from ports in *Ireland* after the 1st of *September;* and that the time of clearing from the Custom-house should be deemed the time of sailing, provided the ship were then ready for sea.

The *Perseverance* being in the port of *Sligo*, dropped down the river before the 1st of *September*, in readiness for sea, except that she had not her full quantity of ballast, there being a bar at the mouth of the river, which the ship could not have crossed with that quantity on board. Boats were waiting on the outside to ship the remainder of the ballast, and the vessel crossed the bar on that day, but struck the bar in doing so, and the master to ascertain what damage the ship had received, crossed *Donegal Bay* to the port of *Kellybegs*, a distance of seven miles. The ship on arriving at *Kellybegs*, was found not to be injured, and the ballasting was completed there. It was finished on the 4th of *September*, but the ship was detained by accidental circumstances till the 8th, when she sailed on her voyage, and was subsequently lost. The ship's proper complement of men was nine; she left the *Ballyshannon* river with only *eight, the carpenter being absent. Another carpenter [*687] was hired at *Kellybegs*, and sailed on the voyage. At the trial before *Littledale*, J., at the Spring Assizes for *Newcastle-upon-Tyne*, the above facts were found for the opinion of the Court. For the underwriters it was contended that the ship did not sail on the 1st of *September*, according to the rules referred to by the policy. A verdict was found for the plaintiff, subject to the opinion of the Court. The judgment was afterwards delivered by Lord *Tenterden*, C. J.—"The general principle of the decisions is this, that if a ship quits her moorings and removes, though only to a short distance, being perfectly ready to proceed upon her voyage, and is by some subsequent occurrence detained, that is nevertheless a sailing: but it is otherwise if, at the time when she quits her moorings, and hoists her sails, she is not in a condition for completing her sea voyage. In the present case, by the regulations which have been referred to, the last day for a vessel, sailing from any port in *Ireland* is the 1st of *September;* and the objection which prevails with me is, that she was not in a condition to sail during the 1st, because she had not on that day the proper quantity of ballast to enable her to cross the Atlantic. It is answered that she could not take in her whole ballast before she crossed the

(*a*) 1 Camp. 508, n. *Ante*, p. 207. (*b*) Pettegrew v. Pringle, 3 B. & Ad. 514.

bar; but that everything was prepared for landing the remainder afterwards: the vessel struck on the bar in passing, and the master thought it best to put into another port before he completed his ballast. Now if the ship had taken in her whole ballast on the 1st of *September*, I think it might have been said that she sailed that day, according to the regulations: but as unfortunately she was not able to load the whole ballast for her voyage on the 1st, she was not, on that day, in a condition to go on with her voyage; and, consequently I am of opinion that the plaintiff cannot recover on this policy, and a nonsuit must be entered."

Parke, J.—"I am of the same opinion, and agree in the rule for the construction of this kind of warranty, which has been laid down by my Lord, and [*688] which is also stated by the *Court in somewhat different terms, but to the same effect, in *Lang* v. *Anderdon*. (*a*) Now here the vessel had not, according to the language used in that case, 'every thing ready for the performance of her voyage,' on the 1st of *September*, nor could it be said when she got under sail, that 'nothing remained to be done afterwards;' for she had to take on board what was material for the prosecution of the voyage, a larger portion of ballast: and no distinction can be drawn between the necessity of taking in more ballast, and that of receiving part of the cargo."

There is a case of *Cockrane* v. *Fisher*, (*b*) in error from the Court of Exchequer, in which the Court of Error seem to draw a distinction between the words "sailing for a place," and "departure from a place." In this case the ship was "warranted not to sail for *British North America*, after the 15th of *August*," and on that day she was in the dock at *Dublin*, ready for sea, and having cleared for *Quebec* was hauled out of the dock into the *Liffey*, as early in the afternoon as the tide permitted. In consequence of the wind she could not get a sail, but was warped down the river about half-a mile, when the tide failing she took the ground. She was warped a little further the next day, and took the ground again about ten miles from the harbour's mouth. On the 17th, the wind having changed, she set sail, and got out to sea. The jury found that the master and crew, by hauling out of dock, and warping down the river on the 15th, intended to put themselves in a more favourable situation for prosecuting the voyage from *Dublin* to *North America*, and not merely to fulfil the warranty, at the same time when the vessel quitted the dock, they knew it was impossible to get to sea that day. Lord *Denman*, C. J., said.—"We are of opinion that this vessel must be taken under the circumstances stated, to have been on the 15th of *August* in the prosecution of the voyage to *North America*, for in point of fact she had commenced her voyage. In order to bring the [*689] *case within those decisions in which it has been held that the voyage had not commenced, and that therefore the policy did not attach, Mr. *Cresswell* has been obliged to assume that there was a particular '*terminus a quo*' contemplated in this policy; but when we look at the terms of it we do not find that that is warranted as a term of the policy; but being a time policy, in general, the warranty is that she shall not sail for *British North America* after the 15th of *August*. If, therefore, she was, in fact, in the prosecution of her voyage for any place, which voyage is not proved to have commenced after the 15th of *August*, the warranty is not broken; and as the facts appear to us clearly to shew that she was in the prosecution of her voyage on the 15th of *August*, having made a movement, though in the river, for the purpose of proceeding to sea, and over the sea, to *North America*, the warranty has not been broken, and the parties are entitled to recover. That makes this case of no very general application, and distinguishes it from all those that

---

(*a*) 3 B. & C. 499, *ante*, p. 684. (*b*) 1 C., M. & R. 809; 5 Tyr. 496.

have been before the Court on former occasions: for there is no particular point from which the voyage is contemplated as commencing. If that had been so, we should have been bound to consider the effect of the word 'sailing' as contradistinguished from 'departure,' which we do not feel ourselves called upon to do on the present occasion. Mr. *Cresswell* has very properly given up the point, that the word 'sailing' can be confined to the mere technical act of hoisting the sails, or anything of that sort; the fair question is, as he has stated, whether at the time in question the voyage can be said to have commenced, and whether the ship was, in truth, proceeding on her voyage to *America*. Now considering that there was no distinct point of commencement pointed out by this policy, we think that the vessel was in the prosecution of her voyage, and consequently within the protection of the policy."

The same principles of law were adhered to in the recent case of *Graham, Executrix*, v. *Barras*, (*a*) to which I have *already referred, and [*690] which is, I believe, the last case which has been decided upon this subject. The insurance was on a time policy, on the ship *Castlereagh*, at and from 1st *April*, 1831, to 1st *January*, 1832, warranted not to "sail foreign" after the time restricted by the Liberal Premium Club Rules. The rules or warranties of this club limited the times of sailing to different parts of the world, and by a distinct warranty, (the ninth) it was declared, that the time of clearing at the Custom-house should be deemed the time of sailing, provided the ship was then ready for sea. The *Castlereagh* was bound for the *Bay of Fundy* from *Dublin*, and the last day for sailing, by the rules, was the 1st *September*. She cleared out on the 31st *August*, and dropped down the *Liffey* on the 1st *September* with an incomplete crew (though a full complement was engaged before she cleared out) to the *Pigeon Hole* within the port or harbour of *Dublin*, assisted by a boat's crew. During that day the whole of the crew came on board. In the afternoon and evening of the 1st the wind was unfavourable for the *Castlereagh* going to sea, but a little before midnight it became fair, it being then low water, and she went out as soon afterwards as she could with a fair wind. On the 2nd *September*, about half-past three o'clock, she sailed from the *Pigeon Hole*, and proceeded on her voyage, and ultimately, and not before, quitted the port of *Dublin* about half-past five on the morning of the 2nd *September*. The *Pigeon Hole* is about two miles below the Custom-house, and from the *Pigeon Hole* to the mouth of the port of *Dublin* is two miles further. At the trial before *Alderson*, J., at the Spring Assizes for *Northumberland*, 1833, a verdict was found for the plaintiff, subject to the opinion of the Court upon the above case. The question for the opinion of the Court was, whether the sailing of the *Castlereagh* under the circumstances above detailed constituted a sailing within the terms of the warranty. Lord *Denman*, C. J., "this is an action on a time policy, the warranty being, not to sail foreign after the time limited in the Liberal Premium Club Rules. I feel great doubt on the first question raised for the defendant, *namely, whether the rules can be referred to for any purpose [*691] but to ascertain the times to which the vessel is restricted in sailing to different parts of the world. But if the ninth article is to be considered as referred to by the policy, the question then is, whether that warranty has been complied with. (His Lordship then read it.) By this regulation the time of clearing is to be deemed the time of sailing 'provided the ship is then ready for sea.' It certainly is most convenient for both parties to have such a stipulation as this, that the time of sailing may be referred to a period of time capable of being ascertained by both; and the time of clearing is such a period. The

(*a*) 5 B. & Ad. 1011.

simple question then is, whether the ship was ready for sea when she was cleared? Now at that time there was a crew engaged, but where they were, whether within ten miles or forty, does not appear. It cannot be said that the ship was ready for sea when she had only the master, mate, one seaman and two boys on board, and could not get down the *Liffey* without assistance."

Littledale, J.—"There was no sailing in this case according to the ordinary sense of that word by the 1st of *September*. Then the question is, first, whether the ninth warranty, which gives a different interpretation to the word 'sailing' is to be considered as inserted in this policy? and I think we ought not to construe this policy so strictly as to hold that warranty excluded. The next question is, whether the assured complied with the condition of sailing, according to that warranty? At the time when the clearances were obtained the crew were not actually on board; it does not appear how that happened, whether they were ready to come on board when it was thought proper to call for them, or whether they were at a distant place, or dispersed over the town or harbour of *Dublin;* at all events they were not on board. Then we have to inquire whether the words 'time of clearing' in the warranty, are to be considered as giving a continual protection down to the time when the crew joined the ship; and I rather think that the words ought not to be restrained to the actual time
[*692] of clearance, but that the 'clearance' is a continuing thing, and *overrides the whole time down to the period on the 1st *September* when the complete crew was on board."

Patteson, J.—"I am also of opinion that the plaintiff cannot recover. Supposing that the ninth clause of warranty is to be considered as part of the policy, I think the vessel was not ready for sea according to that clause. The words 'then ready for sea,' must be referred to the 31st of *August*, when she obtained her clearances, and at that time, the crew appear to have been wandering about *Dublin*. They were, indeed, engaged, but if that were held sufficient, it might as well be said that a ship was ready for sea if a cargo was procured, but not on board."

This decision pushes the principle of law upon this subject to its ultimate point, for it appears that on the evening of the 1st, the ship was ready, and would have sailed but for apprehension of the weather, and only just keeps within the rule laid down by Lord *Mansfield* in the case of *Bond* v. *Nutt*, (*a*) who says, "If the ship had been fairly under way, and afterwards had put back from stress of weather," it would have been a sailing; whereas in the present case the ship was never anything but stationary on the 1st. Mr. Justice *Littledale's* judgment would appear to amount to judgment for the plaintiff, for, according to his opinion, the ship was cleared and ready for the sea on the 1st.

"In insurances at and from *London*, warranted to depart on or before a particular day, it has long been a question, what shall be a departure from the port of *London;* or rather what is the port of *London;* and it is singular that this point has never yet been judicially determined. On the one hand it is said, that the moment the ship is cleared out at the Custom-house, and has all her cargo on board, if she quit her moorings in the river on or before the day warranted, that the warranty is complied with. On the other side, it is contended, and with great appearance of reason, that a ship is not ready for sea, till
[*693] she has got her *Custom-house* cocket on board *which is the final clearance, and which she cannot have till she arrive at *Gravesend*: that till this cocket is received, the ship dare not proceed to sea under a penalty, and till then is not entitled to the drawbacks, and that *Gravesend* is always

(*a*) *Ante*, p. 675.

considered as the limits of the port of *London*, and unless the ship sailed from thence on or before the day limited, there is no inception of the voyage, and the policy is forfeited." (*a*)

But the Court of Common Pleas have held, in *Williams* v. *Marshall*, (*b*) that a ship was not to be considered as having exported from the port of *London*, on clearing at the Custom-house here, nor until she clears at *Gravesend*. Therefore a license to remain in force for the exportation of the cargo till the 10th of *September* was not complied with by clearing at the *Custom-house* on the 9th, and at *Gravesend* on the 12th *September*.

II. The second species of warranty, which most frequently occurs in insurances, is that of sailing under the protection of convoy; that is, certain ships of force, appointed by government, in time of war, to sail with merchantmen from their port of discharge to the place of their destination. (*c*) Accordingly, by the laws of this, and of all other maritime powers, if the insured warrant that the vessel shall depart with convoy, and it do not, the policy is defeated, and the underwriter is not responsible. (*d*) We have already seen, that every warranty must be strictly and literally complied with; and that a liberal and substantial performance merely will not be sufficient. Hence in a warranty to sail with convoy it becomes material to consider, what shall be deemed a convoy within such a condition. Upon this point it has been solemnly settled by the Court of King's Bench, in the case of *Hibbert* v. *Pigou*. (*e*) Mr. Justice *Willes* excepted, who differed from the other learned Judges upon that occasion, "that it is not every single man-of-war, which chooses to take a merchant-ship under its protection, that will constitute such a convoy as a warranty means; but it must be a naval force under the command of a person appointed by the government of the country to which they belong." [*694]

This case came before the Court upon a rule to shew cause why the verdict which the defendant had obtained, should not be set aside and a new trial had. It was an action upon a policy of insurance on the ship *Arundel*, Captain Mann, at and from *Jamaica* to *London*, warranted to depart with convoy. The insurance was at eighteen guineas per cent., to return three per cent., if the ship sailed on or before the 1st of *August*. The facts appearing on the report of Lord *Mansfield*, who tried the cause, are these:—On the 25th of *July*, the *Arundel* sailed from *Morant* harbour to *Kingston*, where she met the *Glorieux* man-of-war, Captain Cadogan, who was likewise on his way to join Admiral Graves at *Bluefields*. Lord Rodney had appointed Admiral Graves to rendezvous at *Bluefields*, in order to take the fleet of merchant-ships, which were to sail from thence upon the 1st of *August*, under his command, and to convoy them to *Great Britain*. Captain Mann, upon their meeting in *Kingston* harbour, asked for sailing orders from Captain Cadogan, who said, he had none, not having himself at that time joined the admiral: but he was sure that Admiral Graves would not sail from *Bluefields* till the *Glorieux* joined him. However, if he should have sailed, he, Captain Cadogan, would give Captain Mann sailing orders, and take every care of the *Arundel* in his power. They proceeded together, and arrived at *Bluefields* on the 28th of *July*; but they found that Admiral Graves had sailed two days before. The *Glorieux* and *Arundel* then sailed from *Bluefields*, the former firing guns, giving signals, and behaving in every respect like a convoy. Upon the 5th of *August*, a signal was made, that the fleet was in sight; and on the 7th, they joined the fleet

(*a*) Park Ins. 692.
(*b*) 2 Marsh. 92.
(*c*) Postlethw. Dict. tit. Convoy.
(*d*) 1 Emerigon, Traité des Assurances, 164.
(*e*) 23 Geo. 3, 1783. Park Ins. 694.

off *Cape Anthonio*. The *Arundel* was afterwards lost, in *September*, in a
[*695] dreadful storm, which dispersed the whole *fleet, and in which a vast number of the ships perished. Upon this evidence, the jury were of opinion, under the direction of the Chief Justice, that the terms of the warranty had not been performed, and they therefore found a verdict for the underwriters, the defendants. After this question had been fully argued at the Bar, the three Judges, Mr. Justice *Ashurst* being, at that time, one of the Lords Commissioners of the Great Seal, delivered their opinions severally.

Lord *Mansfield*.—"Though the underwriters and insured are equally innocent, yet I cannot help saying that now, as well as at the trial, my inclination led me to wish that the plaintiffs were in the right. But the more it is argued it is the less liable to dispute. There are hypothetical contracts and conditional contracts. In the former, the contract depends upon an event taking place; there is no latitude; no equity; the only question is, has that event happened? But conditional contracts admit of a more liberal construction. Now the only question upon this contract is, whether this ship has departed with convoy? A great deal must be referred to the usage of merchants. The government appoints a convoy for the trade, and also names a place of rendezvous. Then comes the reference to the usage of merchants; the voyage is begun at *Kingston*, but the risk only commences at *Bluefields*. Now, though Lord Rodney desires the captain of the *Glorieux* to take any ships he may pick up in his way, and convoy them to *Bluefields*, yet the warranty in the policy by the usage does not require convoy to *Bluefields*. The second reference to the usage of merchants is, what is esteemed a convoy by merchants? A convoy is a naval force under the command of that person whom government has appointed. They trust to the knowledge of government, which must be supposed to be better acquainted with the plans and force of the enemy, and with the strength necessary to repel their attempts. Now this is a general usage to which matters of this kind are referred. Then let us see what the case is here. Lord Rodney
[*696] appoints Admiral Graves to go with ten sail of *the line to *Bluefields*, and from thence to convoy the *Jamaica* trade to *Great Britain*. When they come to the place of rendezvous, they taking sailing orders from the admiral, which are essential to convoy, as by them they know the signals for what places they are to steer, in case of dispersion by storm, or any other just cause. (*a*) Admiral Graves, on the 26th of *July*, for reasons best known to himself, thinks he has got all the ships for which he ought to stay, and proceeds on his voyage. He leaves no orders for the *Glorieux* to follow him to *Cape Anthonio*; and though it is very true that it is in the power of the commander-in-chief to change the place of rendezvous, yet in this case it is not true, as was supposed in evidence, that *Cape Anthonio* was appointed. At the time of sailing from *Bluefields*, the *Glorieux* was no part of the convoy: for she did not come there till two days after the fleet was gone. Upon these facts it did appear to me, and to the jury at the trial, that the warranty was not complied with. I continue of the same opinion now, and that this rule should be discharged."

The rule for a new trial was therefore discharged.

(*a*) I have met with a case of Verdon v. Wilmot, at Guildhall, July, 1844, in the time of Lord Chief Justice Lee, where the ship insured had departed from London, and arrived at the Downs 22nd of August, where the Grafton and Lenox (the convoy) were under sail, and the captain sent one of his men on board for sailing orders, which were refused; but the commodore said, "Keep on, and I will take care of you;" and the ship being lost that night by striking on the shore, the question was, If the ship was put under convoy, having no sailing orders? And it was held she was, and the plaintiff had a verdict. Note to the third edition of Park Ins.

This question, respecting the necessity of having sailing instructions from the commander of the convoy, came on to be considered in the Court of Common Pleas, in *Webb* v. *Thomson*, (*b*) upon a motion for a new trial, when Mr. Justice *Buller*, in the absence of Lord Chief Justice *Eyre*, said:—"Had not my Lord mentioned that the verdict was entirely to his satisfaction, I should not decide upon this application in the first instance. The case is here brought to a question *of law. In point of law, then, the general proposition [*697] is, that sailing instructions are necessary. I have never decided this case myself, but it has often been determined at *Guildhall*. I do not say that there may not be cases in which they may be dispensed with. In *Hibbert* v. *Pigou*, my expression is, 'It is not necessary to say whether sailing orders are essential or not; as at present advised, I do not say that they are absolutely necessary.' The case of *Victoria* v. *Cleeve* goes no further. (*a*) If the captain, from any misfortune, from stress of weather, or other circumstances, be absolutely prevented from obtaining his instructions, still it is a departure with convoy; but then he must take the earliest opportunity to obtain them. Generally speaking, unless sailing instructions are obtained, the warranty is not complied with: the captain cannot answer signals; he does not know the place of rendezvous in case of a storm; he does not in effect put himself under the protection of the convoy, and therefore the underwriters are not benefited." The other Judges concurred in this opinion.

In a still later case of *France* v. *Kirwan*, (*b*) in an action on a policy of insurance on the ship *Potomack*, at and from *Jamaica* to *London*, warranted to depart with convoy from the place of rendezvous on or before the 1st of *August*, 1705, it was admitted that the vessel never had got so near to the admiral, who had, in fact, left the place of rendezvous before the *Potomack* arrived there, as to obtain sailing orders when he lost sight of the convoy, and was afterwards taken. The plaintiffs' object was to get a decision upon the point, how far sailing instructions were essential to the sailing with convoy? (*c*)

Lord *Kenyon* expressed the strong inclination of his opinion to be, that they were essential, but would not decide it, as this vessel had never, in fact, joined. The plaintiffs were nonsuited.

*Monsieur *D'Emerigon*, (*a*) a very distinguished *French* writer upon this branch of jurisprudence, puts this case:—"On avoit fait [*698] des assurances sur un navire, de sorte de *Marseille* jusq'aux *Detroit de Gibraltar*, et dans la police il etoit dit que le navire partiroit de *Marseille* sous l'escorte d'un batiment de roi; autrement assurance nulle. Une fregate chargeé de munitions de guerre pour *Algesiras*, se trouvoit à *l'Estaque*. Le navire assuré mit à la voile sous les auspices de cette fregate, que lui accorda protection, et qui partit en meme temps. Consulté sur ce cas, je fus d'avis que si le navire étoit pris par les ennemis, les assureurs seroient fondés a refuser le payment de la perte; car autre chose est d'etre sous l'escorte d'un batiment du roi, et autre chose est de naviguer simplement sous ses auspices."

Having seen what shall be deemed a convoy, let us proceed to consider what shall be a departure with convoy within the meaning of a warranty to depart with convoy.

In the case of *Lilley* v. *Ewer*, (*b*) which was an action brought against an underwriter for a return of premium. The policy was on the ship the *Parker*

(*b*) 1 Bos. & Pull. 5.
(*a*) See *post*, p. 700.
(*b*) Sittings at Guild. after Mich. 38 Geo. 3. Park Ins. 699.
(*c*) See a very elaborate judgment of Lord Eldon on this point in the case of Anderson v. Pitcher, 1 Bos. & Pull. 264.
(*a*) 1 Emerigon, p. 171.
(*b*) 1 Doug. 72.

Galley, "at and from *Venice* to the *Currant Islands*, and at and from thence to *London*," at a premium of five guineas per cent. "to return two per cent. if the ship sailed with convoy from *Gibraltar*, and arrived." The ship touched at *Gibraltar* on her way home, and sailed from thence under convoy of the *Zephyr* sloop of war, but the convoy was destined only to go to a certain latitude, about as far as *Cape Finisterre*, being ordered on to the *Lisbon* station; and accordingly the ship and convoy separated, and the ship arrived safe at *London*. The only question in the case was, whether by the terms of the policy, the condition for the return of premium was a departure from *Gibraltar* with such convoy as could be met with, for whatever part of the voyage that might happen to be, or a departure with convoy for the voyage? The trial came on before Lord *Mansfield* and a common jury, when a verdict was found for the plaintiffs.

[*699] *A rule having been obtained to show cause why there should not be a new trial; the evidence from his Lordship's report appeared to be thus:—That the plaintiffs had called witnesses (one of whom was Mr. Gorman, an eminent merchant) to prove that for some years past, when convoy for the voyage, or the whole voyage was intended, those explanatory words had been added, and that by this usage, the expressions of "sailing with convoy," and "sailing with convoy for the voyage," had received distinct technical meanings: "with convoy," signifying whatever convoy the ship should depart with, whether for a greater or less part of the voyage. Several policies were also produced, which had been filled up at the office of the same broker, who had prepared that which had given occasion to this cause, in which the words "for the voyage," or "for *England*," were added. The captain proved, that at the time when he left *Gibraltar*, no other convoy was to be had. The witnesses for the defendant swore, that they understood the words "with convoy," to mean, convoy for the voyage; and the broker said, that, at the time this policy was signed, he understood and apprehended it was so understood by all the parties, that the convoy was to be for the voyage, and that the return was such as was usual, when convoy for the voyage was meant. His Lordship, after stating the evidence, said, "That when the case was opened, he thought, on the face of the policy, that the words must mean for the voyage. He had not admitted the counsel to ask the opinion of the witnesses on the construction; but to learn whether there was any usage in this case, which would give a fixed technical sense to the words. This was a question of fact to be ascertained by evidence, and proper for the consideration of a jury."

The case was fully argued at the Bar.

Lord *Mansfield*.—"On the words I was strongly of opinion, that the policy meant the departure with convoy intended for the voyage. The parties could not mean a departure with convoy, which might be designed to separate from the

[*700] ship *in a minute or two; though when convoy for the whole of a voyage is clearly intended, an unforeseen separation is an accident, to which the underwriter is liable; for the meaning of such a warranty is not that the ship and convoy should continue and arrive together. But I still think that the evidence was properly admitted at the trial of this cause; because the sense contended for by the plaintiffs, was not inconsistent with the words of the policy, and, therefore, it was material to see what the usage was. I laid great stress on Mr. Gorman's testimony. I did not consider him as a common witness. However, it seems, from what I have heard since, that the people in the city are dissatisfied with the verdict, and think the evidence of the plaintiff's witnesses was founded on a mistake. Certainly critical niceties ought not to be encouraged in commercial concerns; and wherever you render additional words necessary, and multiply them, you also multiply doubts and criticisms. It may be hard, because words have been added in some instances,

to force a construction in this case, from the omission of them. The question is of great importance."—The rule, therefore, was made absolute. (*a*)

Even where the ship has by tempestuous weather been prevented from joining the convoy at all, at least, of receiving the orders of the commander of the ships of war, if she do every thing in her power to effect it, it shall be deemed a sailing with convoy, within the terms of the warranty.

In the case of *Victoria* v. *Cleeve*, (*b*) the plaintiff had insured on goods in the *John* and *Jane*, from *Gottenburg* to *London*, with a warranty to depart with convoy from *Fleckery*. In *July*, 1744, the ship sailed from *Gottenburg* to *Fleckery*, and there she waited for convoy two months. On the 21st of *September*, at nine in the morning, three men-of-war, who had one hundred merchant ships in convoy, stood off *Fleckery*, and made a signal for the ships there to come out, and likewise *sent in a yawl to order them out. There [*701] were fourteen ships waiting, and the *John* and *Jane* got out by twelve o'clock, and one of the first; the convoy having sailed gently on, and being two leagues ahead. It was a hard gale, and by six in the afternoon, the ship came up with the fleet; but could not get to either of the men-of-war for sailing orders, on account of the gale of wind. It was stormy all night, and at day-break the ship in question was in the midst of the fleet; but the weather was so bad, that no boat could be sent for sailing orders. A *French* privateer had sailed amongst them all night; and it being foggy on the 22nd, attacked the *John* and *Jane* about two, who kept a running fight till dark, which was renewed the next morning, when she was taken. For the defendant it was insisted, that this ship was never under convoy, nor is ever considered so, till they have received sailing orders; and if the weather would not permit the captain to get them, he should have gone back.

But the Chief Justice and the jury were of opinion, that as the captain had done every thing in his power, it was a departing with convoy: and those agreements are never confined to precise words; as in the case of departing with convoy from *London*, when the place of rendezvous is *Spithead*, a loss in going thither is within the policy. So the plaintiff recovered.

But it is evident from all that has been said, that if there be an opportunity of convoy; if the convoy throw out repeated signals to join; and by the negligence and delay of the captain of the insured ship, the opportunity be lost, the warranty to depart with convoy is not complied with, and the underwriter is discharged.

Thus in *Taylor* v. *Woodness*, (*a*) which was an action on *a [*702] policy of insurance tried before Lord *Mansfield*, the plaintiff was nonsuited, there being a warranty to depart with convoy: and it appearing from the evidence, that the commodore of the convoy had made signals for sailing from *Spithead* to *St. Helen's* the night before, and had made repeated signals the next morning from seven o'clock till twelve, notwithstanding which, the ship insured had neglected to sail with him and did not sail till two hours after, in consequence of which she was taken by a privateer.

Although we have thus seen, that a ship must not voluntarily depart from convoy during the voyage, yet this species of warranty must always be construed with reference to the usage of trade, and to the orders of government. For if the course upon a particular voyage has been to have a relay of convoy,

---

(*a*) The new trial came on before Lord Mansfield at the Sittings after Trin. Term, 19 Geo. 3, when the verdict was found for the defendant. Doug. 74, note (7).

(*b*) 2 Str. 1250.

(*a*) Sit. at Guild. Hil. Vac. 4 Geo. 3. Park Ins. 707. As to the duty of the officers appointed for convoy to merchant ships, see it prescribed in the stat. of the 13 Car. 2, stat. 1, c. 9, art. 17; which regulations were confirmed by the 22 Geo. 2, c. 33, s. 2, art. 17.

protecting the trade from one port to another; or if government appoint a convoy to escort the trade of a place to a given latitude and no farther; and there be no other convoy on that station, a vessel, taking the advantage of such a convoy, has complied with the warranty to sail with convoy for the voyage.

Thus in the case of *Smith* v. *Readshaw*, (*a*) which was an insurance on the ship *William*, "at and from *London* to *Jamaica*," warranted to depart with convoy for the voyage, Lord *Mansfield*, in the course of his summing up to the jury, said,—"A warranty to sail with convoy means with such a convoy as government pleases to appoint; and whether it consists of separate ships at different stations or not, it is a convoy for the voyage; therefore on that point there is no doubt.

The same doctrine was held by Lord *Kenyon*, in *De Garey* v. *Claggett*, (*b*) which was an action on a policy of insurance at and from *Cadiz* to *Amsterdam*, warranted to sail with convoy for the voyage. The ships insured had
[*703] sailed from *Cadiz* under a *British* convoy; and were lost before they *reached the *Downs*, where it was alleged they were to have taken a fresh convoy for *Amsterdam*. The underwriters insisted that the convoy should have been direct to *Amsterdam*. The assured, on the other hand, contended, that all convoy must be according to usage, and that in many voyages there is no such thing as a direct convoy, but that the vessels proceed by relays of convoy from stage to stage. The special jury, with Lord *Kenyon's* approbation, gave a verdict for the plaintiffs. And although in that case, it is true, the underwriter had adjusted the policy with full knowledge of all the circumstances, which his Lordship seemed to think conclusive, yet there were other causes on the same policy, where there was no adjustment; and upon Lord *Kenyon* and the jury declaring that, without considering the adjustment, they thought the warranty had been complied with, the plaintiff had a verdict, and no motion was ever made for a new trial in any of these causes.

So also the Court of Common Pleas decided in *D'Eguino* v. *Bewicke* (*c*) which was an action on a policy on the ship *Little Betsey*, at and from *London* to *St. Sebastian*, warranted to sail with convoy. The ship sailed with other vessels under convoy of several ships of war: and after a certain latitude, the *Weazel*, one of the men-of-war, was detached to convoy the *Spanish* ships: but the captain of that ship had orders to go with the *St. Sebastian* ships no further than *Bilboa*, and in fact he went no farther. A verdict passed for the plaintiff. When the case came on before the Court on a motion for a new trial, it was argued for the underwriters, that warranties are to be strictly complied with; and that however near the port of *St. Sebastian* might be to *Bilboa*, yet the principle was the same; and that a convoy to the latter place could no more be construed to be a convoy to the former, than a convoy to the *Cape of Good Hope* could be a convoy to the *East Indies*, and for this was cited *Hibbert* v. *Pigou*. (*d*)
[*704] *Mr. Justice *Buller*.—"The case of *Hibbert* v. *Pigou* is not applicable to this, for there a convoy was appointed and actually sailed from *Jamaica* to *England;* as to the instance put at the Bar of a convoy to the *Cape of Good Hope*, I entirely differ from the counsel on that point; for if Government thought a convoy to the *Cape* was a sufficient protection to the *East India* trade, and the usage were for the *East India* ships to sail with a convoy only to the *Cape*, and to consider that as the *East India* convoy, and no other convoy was appointed to the *East Indies*, I should hold that the

(*a*) London Sittings after Easter, 1781. Park Ins. 708.
(*b*) London Sittings after Mich. 1795. Park Ins. 708.
(*c*) 2 H. Black. 551. (*d*) *Ante*, p. 693.

warranty was complied with; though I agree, if there was another convoy to the *East Indies*, it would be otherwise. The captain of a merchant-ship has nothing to do with, nor can he know the instructions from the Admiralty to the King's officers, but must take such convoy as he finds. I am, therefore, of opinion that there is no ground for this motion." Rule refused.

III. The third and last species of warranty which is now to claim our attention, is that of neutrality. This differs from the two preceding ones in this respect, that inasmuch as in the former the policy was only avoided by the breach, but in this case if the warranty is not complied with, the policy is void in the commencement, on account of fraud. We saw in a former part of this section, that the Judges, in the case of *Lothian* v. *Henderson*, (*a*) had no doubt that when the description in the policy in that case was "on the good ship called the *Catharine*," an "*American* vessel," that this was an express warranty that she was an *American*, which was a neutral nation in the war.

Thus in *Woolmer* v. *Muilman*, (*b*) on a special case reserved for the opinion of the Court, it appeared that an action was brought for the recovery of a total loss on a policy of insurance made on goods, on board the ship *Bona Fortuna*, at and from *North Bergen* to any ports or places whatsoever, until her safe arrival in *London*, "warranted neutral ship and *property." The ship, with the goods so being on board her, after her departure [*705] from *North Bergen*, and before her arrival at *London*, proceeding on her voyage, was, by force of the winds and stormy weather, wrecked, cast away, and sunk in the seas, and the said goods were thereby wholly lost. The ship called *La Bona Fortuna*, at and before the time she was lost, was not neutral property, as warranted by the said policy. The question was, whether under such circumstances the plaintiff could recover? Lord *Mansfield*, after hearing counsel for the plaintiff, stopped those for the defendant, saying, the point was too clear to be argued. There was a falsehood with respect to the thing insured, for he insured neutral property when it was not so, therefore there is no contract. We must give judgment for the defendant.

And in the case of *Tubbs* v. *Bendleback* (*c*) it was held, that an *American* by birth, who has resided for some years with his family in *England*, though himself has been occasionally in *America*, is so far to be considered as a *British* subject, that if a ship of his be warranted *American* property it is not to be deemed so, though the vessel was built in *America* and registered there, and such a plaintiff in an action upon a policy of insurance was nonsuited.

The plaintiffs in the case of *Eden and another* v. *Parkinson*, (*d*) insured the ship the *Yonge Herman Hiddinga*, and her cargo, "at and from *L'Orient* to *Rotterdam*, warranted a neutral ship and neutral property." The ship being captured in the course of her voyage by some *English* men-of-war, the plaintiffs brought this action against the defendant, one of the underwriters on the policy, stating in their declaration, that the defendant subscribed the policy on the 28th of *November*, 1780, and averring that the ship and cargo were at that time neutral property. The trial came on before Lord *Mansfield* at *Guildhall*, when a verdict was found for the plaintiffs, subject to the opinion of the Court upon a case stating, that *the ship in question sailed from [*706] *L'Orient*, on the voyage insured, on the 11th of *December*, 1780, having the insured cargo on board, and both the ship and cargo were neutral property at the time of the ship's departure from *L'Orient*, and so continued until the 20th of *December*, 1780, on which day hostilities having commenced

(*a*) 3 B. & P. 499, *ante*, p. 664. (*b*) 4 Burr. 1419; 1 Black. 427.
(*c*) 4 Esp. 108, and 3 Bos. & Pull. 207, note S. C.
(*d*) Doug. 732.

between the *English* and the *Dutch*, the *Dutch* ceased to be a neutral power, and the ship and cargo ceased to be neutral property. They were taken on the 25th of *December*, 1780, and condemned as lawful prize, in the Admiralty Court, on the 19th of *February*, 1781.

Lord *Mansfield*.—"Many points have been gone into in the argument on both sides at the Bar, which are not necessary for the decision of this case. For instance, there is no doubt but you may warrant a future event. But the single question here is, what is the meaning of this policy? I had not a particle of doubt at the trial, and I know the jury had none; but Mr. *Lee* pressed for a case, and I granted one out of respect to him. What is the case? It is an insurance upon a ship and her cargo, at and from *L'Orient to Rotterdam*. The insured warrant them neutral, and the defendant would have the Court to add, by construction, 'and so shall continue during the whole voyage.' The contract is not so. The insured tell the state of the ship and goods then, and the insurers take upon themselves all future events and risks, from men-of-war, enemies, detention of princes, &c. The parties themselves could not have changed the nature of the property; but they did not mean to run the risk of the war. If it made a difference what country the property belonged to, the underwriters should have inquired. The risk of future war is taken by the underwriter of every policy. By an implied warranty every ship must be tight, staunch, and strong; but it is sufficient if she shall be so at the time of her sailing. She may cease to be so in twenty-four hours after her departure, and yet the underwriter will continue liable. The case of *Lilly* v. *Ewer*, (*d*) [*707] turns quite the other way. The decision *there was, that the ship must sail with convoy, according to the usage of the trade; that is, convoy destined to go as far as usual in that voyage. The present is the clearest case that can be. The warranty is, that things stand so at the time, not that they shall continue."

The *postea* was delivered to the plaintiffs.

And afterwards in a subsequent case of *Saloucci* v. *Johnson*, (*a*) in the course of the argument Mr. Justice *Buller* said, "I do not agree with the counsel, who contend, that the property must continue neutral during the whole voyage; if it be neutral at the time of sailing, and a war break out the next day, the underwriter is liable."

And in a still later case of *Tyson* v. *Gurney*, (*b*) which came on for trial before Lord *Kenyon* at *Guildhall*, this point was one amongst others saved for the opinion of the Court of King's Bench. But when the case came on to be argued, the counsel for the defendant abandoned the objection upon the authority of *Eden* v. *Parkinson*, and *Saloucci* v. *Johnson*.

I now propose to consider the important question which has met with much discussion, viz: how far the Courts of Law in this country have held the sentences of foreign Courts of Admiralty, to be conclusive evidence that the property was not neutral; so as to discharge the underwriters? and I shall first refer to some important cases decided in the Court of Admiralty on this point.

The first case which I shall mention is that of "The *Flad Oyen*, Martenson, master," in which judgment was delivered in the High Court of Admiralty, *January* 16th, 1799. (*c*) This was the case of an *English* prize ship carried into a neutral country and there sold under the sentence of condemnation by the *French* consul, and taken the 12th *January*, 1798. The claim was given on behalf of the purchaser a *Danish* merchant. For the claimant it was contended that there was nothing illegal in a sentence of condemnation in a neutral

(*d*) *Vide ante*, p. 698.
(*b*) 3 T. R. 477.
(*a*) See *ante*, p. 307, and *post*.
(*c*) 1 Rob. A. R. 134.

*country, into which the captors had carried the prize ship: and they quoted books of authority on this point. (a) Sir *W. Scott* [*708] now delivered judgment. "This is the case of a ship taken by a *French* privateer and carried into *Bergen* in *Norway*, where it appears she underwent a sort of process, which terminated in a sentence of condemnation, pronounced by the *French* consul; and under that sentence she is asserted to have been transferred to the present neutral proprietor. The sale was conducted by public auction; but it appears that the very person who was the purchaser in that case, was likewise the actual seller, and stood in the capacity of general agent, at this place, for the *French* nation. She was put up to auction, there was no bidder whatever, and she was purchased by himself under the denomination of agent. It appears that the ship was sent immediately to *France*, which of itself colours the nature of the purchase, and shews that it could not be for a mere *Dane*, and for *Danish* commerce; but on behalf of persons resident in *France*. It appears, likewise, that he sent this vessel with papers for the island of *St. Martins;* but in fact, gave verbal directions to the master to get her into the port of *Havre*, if he possibly could. From the depositions of the master, I think it was entirely with the knowledge of the pretended purchaser that that was a blockaded port, and that there has been a fraudulent intention to break the blockade, which was at the time actually existing. Under these circumstances, I am of opinion, that this does amount to that fraudulent conduct on the part of the purchaser: which would debar him from the advantage of further proof. I am of opinion that it was no actual transfer but was going to *France*, as the property of the *French* captors to be put into their possession, and therefore, on that part of the case I should have little doubt in pronouncing a sentence of condemnation.

But another question has arisen in this case upon which a great deal of argument has been employed, viz: whether the *sentence of condemnation which was pronounced by the *French* consul is of such [*709] legal authority as to transfer the property, supposing the purchase *bonâ fide* made? I apprehend that the general practice of the law is, that a sentence of condemnation is at present deemed necessary, and that a neutral purchaser in *Europe* during war, looks to the legal sentence of condemnation as one of the title deeds of the ship, if he buys a prize vessel. I believe there is no instance in which a man having a prize vessel of a belligerent has thought himself quite secure, merely because the ship has been in the enemy's possession 'twenty-four hours,' or carried '*infra presidia.*' The contrary has been more generally held; and the instrument of condemnation is amongst those documents which are most universally produced by a neutral purchaser, and if she has been taken as prize, it should appear that she has been in a proper judicial form, subject to adjudication. Now in what form have these adjudications constantly appeared? They are the sentences of Courts acting and exercising their functions in the belligerent country; and it is for the first time in the world that in the year 1799, an attempt is made to impose upon the Court a sentence of a tribunal not existing in the belligerent country, but of a person pretending to be authorized within the dominions of a neutral country. Now, it having been the constant usage that the tribunals of the law of nations shall exercise their functions in the belligerent country; if it was proved to me in the clearest manner, that on mere general theory such a tribunal might act in the neutral country; I must take my stand on the ancient and universal practice of mankind, and say that so far as that practice has gone, I am willing to go; and where it has thought proper to stop, there must I stop likewise.—I

(a) Cons. Del. Marc. 287. Vattel, b. iii. c. 7, s. 132.

am of opinion upon the whole, that this ship must be restored to the *British* owners upon the usual salvage."

And in the case of *The Christopher*, (*a*) in which a *British* prize ship taken [*710] by the *French*, and carried into the *Spanish* *port *St. Sebastian;* from whence the ship's papers were sent to *France*, and a sentence of condemnation passed at *Bayonne*, *May* 9th, the ship still lying in the *Spanish* port. The ship was then sold to the present claimant, a merchant of *Altona;* and was sailing at the time of the capture, *July*, 1799, in ballast from *St. Sebastian* to *Altona*. On the part of the captors it was contended that this was a purchase, resting on an illegal condemnation, and therefore could not transfer any right or just title to the neutral claimant.

Sir *W. Scott* now delivered judgment.—"This is a case materially differing from those in which condemnation has passed on ships carried into a neutral country; those proceedings have been held illegal, principally because it was to be presumed that a neutral government would not so far depart from the duties of neutrality, as to permit the exercise of that last, and crowning act of hostility, the condemnation of the property of one belligerent to the other. But this will not hold good with respect to condemnations passed on ships brought into the ports of an ally in the war. In such cases there is nothing to prevent the government proceeding to that last act of hostility; there is a common interest between them on the subject; and both governments may be presumed to authorize any measures conducing to give effect to their arms; and to consider each other's ports as mutually subservient. I am, therefore, inclined to hold such a condemnation sufficient in regard to property taken in the course of a common war." Ship restored.

In the case of the *Betsy*, (*b*) 12th *August*, 1800, which was a case under circumstances precisely similar, the question of law was waived, and the legality of the condemnation being admitted by the Court, further proof was directed to be made of the fact of transfer. The principles laid down by the learned Judge of the Court of Admiralty, are agreeable to the decisions of the Courts of Law upon the subject.

[*711] In the case of *Donaldson* v. *Thompson*, (*c*) which was an action *on a policy of insurance on the *American* ship *Maryland Mary*, at and from *Gibraltar* to a market, with leave to call and land goods at two or more ports in the *Mediterranean*. The ship having landed some goods at *Malta*, proceeded thence with the rest of her cargo for *Smyrna*, but was the same day captured by a *Russian* privateer, and being afterwards carried into *Corfu*, was there condemned as lawful prize. The sentence of condemnation was pronounced at *Corfu*, in *July*, 1807. The condition of *Corfu* in that year and month, was described by a gentleman who had acted there as an *English* consul. He stated that, at that time there was a *Russian* garrison in *Corfu*, and the *Russians* had about 6,000 men in the different islands of the republic; that they had made *Corfu* a military station for four years, and they continued in possession of it till they delivered it up, at the peace of *Tilsit*, to Bonaparte: but that previously to that event, the flag of the *Ionian* Republic flew from the forts in the island; there was a Port-Admiral appointed by the *Ionian* Republic, and the witness was recognized as *English* consul by Prince and Senate of the *Ionian* Republic, who continued his functions till the Republic was dissolved by the *French*. Lord *Ellenborough*.—"I shall not receive the sentence." Under these circumstances the *Russians* must have been considered visitors in *Corfu*, and not as sovereigns. While a government subsists

---

(*a*) 2 Rob. A. R. 210.
(*b*) Note, 2 Rob. 210.
(*c*) 1 Camp. 428.

as this did, we cannot look to the degree in which it might be overawed by a foreign force. The sentence was pronounced by a belligerent on neutral territory, and is therefore void. I am by no means disposed to extend the comity which has been shewn to these sentences of Foreign Admiralty Courts. I shall die, like Lord *Thurlow*, in the belief that they ought never to have been admitted. The doctrine in their favour rests upon an authority in *Shower*, (*d*) which does not fully support it: and the practice of receiving them often leads to great injustice. In the ensuing Term a motion was made to set the verdict aside, *(which had been found for the plaintiff,) a rule *nisi* was granted: but, cause being shewn, it was discharged. His Lord- [*712] ship said, "It is impossible to say the government of the *Ionian* Republic was superseded, at a time when its institutions subsisted, and its supremacy was recognized. How, then, was *Corfu* a co-belligerent? Only because it endured a hostile aggression."

In the case of *Havelock* v. *Rockwood*, (*a*) it was held by the Court of King's Bench, that a sentence of condemnation of a *British* ship (which had been captured by a *French* privateer and carried into *Bergen* in *Norway*) by the *French* consul at *Bergen* was an illegal sentence; and that where the owner after such a sentence repurchased his ship at a public auction at *Bergen*, he could not recover the money so paid by him from the underwriter, such a contract is a ransom and illegal, (void at that period by 45 Geo. 3, c. 72, now expired.)

Lord *Kenyon*.—"I need not say much on the first point respecting the sentence of the supposed court at *Bergen:* a question that affects all commercial states, because that point has so lately been solemnly decided by Sir *W. Scott*, who determined on grounds that will recommend the decision to all those who fill a judicial situation. And I can only add, that I most perfectly concur in the opinion there given." (*b*)

But in the case of *Oddy* v. *Bovill*, (*c*) it was held that a sentence of condemnation, of a prize taken by a *French* privateer and carried into *Spain*, by a *French* Court sitting there (*Spain* then being a belligerent ally of *France* in the war against *Great Britain*) was valid; and such condemnation proceeding on the ground of the property being enemy's and *British*, was conclusive in an action on a policy against the underwriter by the assured who has insured as *Danish*, as it was in fact, *Denmark* then being neutral.

In the case of *Bernardi* v. *Motteux*, (*d*) which was an insurance [*713] *"on the ship '*Jane*,' warranted neutral ship and property," it was held that the sentence of a *French* Court of Admiralty which stated that "the captured ship was on her voyage to an enemy's port with goods consigned to persons there, though stated in the bills of lading to belong to neutrals: and there being reason to suspect that the captain had thrown his papers overboard, therefore, the ship and cargo was condemned as prize," this being ambiguous, and there being reason to suppose that the ground of the sentence was the throwing the papers overboard, contrary to a *French* ordinance, not to be conclusive evidence to falsify the warranty.

But where it appears, without a possibility of doubt, that the sentence proceeded on the ground that the property 'not being neutral,' it is conclusive evidence against the assured that he has not complied with the warranty. This was fully settled in the case of *Barzillay* v. *Lewis*. (*a*)

(*d*) Hughes v. Cornelius, 2 Show. 232. (*a*) 8 T. R. 268.
(*b*) The Flad Oyen, 1 Rob. A. R. 135. *Ante*, p. 707.
(*c*) 2 East, 473. (*d*) Doug. 575.
(*a*) B. R. Trin. Term, 22 Geo. 3. Park Ins. 725. And see Baring v. Claggett, 3 Bos. & Pull. 201, and Baring v. Christie, 5 East, 398. Acc.

It was an action on a policy of insurance on a ship from *Liverpool* to *Amsterdam*, warranted *Dutch* property; and it was brought to recover for a total loss, the ship having been captured by the *French*, and condemned by the Court of Admiralty there. The plaintiff (the insured) was nonsuited in this action, from an idea, that the decree of the Parliament of *Paris* was decisive against him, that he had not complied with his warranty. Upon a motion to set aside this nonsuit, the following facts appeared from the report of the Judge who tried the cause. The ship in question was originally a *French* privateer called *L'Aimable Agathée*, which was taken by an *English* privateer, and carried into *Liverpool*, condemned in *England*, and she then got the name of *The Three Graces*. A merchant at *Liverpool* afterwards bought her for a house at *Amsterdam*, and a passport was sent for her from thence. She was then insured by a *Dutch* name, and warranted as in the policy; she went to sea, was captured *by a *French* ship, and carried into *St. Maloes*, where she was released by the Vice Admiralty Court as being *Dutch*. But upon an appeal to the Parliament of *Paris*, the sentence was reversed, and she was condemned as lawful prize, by the name of *The Three Graces* of *Liverpool*. It appeared in evidence, that there were certain *French* ordinances, which ordain, that where more than one-third of the crew of a neutral ship are enemies to the King of *France*, the ship shall be confiscated: that no ship shall be considered as transferred, till she has been within the port of the purchaser; and that a passport shall be deemed fraudulent, unless the ship has been in the port from whence it has been obtained. The ship's crew in question consisted of sixteen, five of whom were *French*, four were *Danes*, two were *Swedes*, one was *Dutch*, one *Portuguese*, one *Hamburgher*, one *Norwegian*, and one *Irishman*. Some of the crew swore, that they were hired by *Englishmen*, and that both the ship and the cargo were *English*. They also swore that when the ship which took them came in sight, the captain sailed back towards the *English* coast: but one of the crew having informed him that the ship in sight carried *English* colours, he resumed his course.

[*714]

Lord *Mansfield*.—"The sentence of the Court of Appeal in *France* is conclusive. The question is, What that sentence means? She is condemned as not being a *Dutch* ship. The warranty is, that she is *Dutch*, which is false. The law of nations is founded on eternal principles of justice; and in every war the belligerent powers make particular regulations for themselves. But no nation is obliged to be bound by them, unless they are agreeable to the general laws of nations; but all third persons and mercantile people are bound to take notice of them for their own safety. In this case, the plaintiffs warrant this ship to be *Dutch;* and they must see that she is in such a state as to be entitled to all privileges of neutral property. The insurers took the risk upon this warranty: she was insured by her *Dutch* name, and the underwriters take it for granted that she is so: but *when the matter is sifted in *France*, she appears to have none of the requisites to shew she was neutral property, for she had never been in a *Dutch* port, and the sea-brief or passport was not conformable to the treaty of *Utrecht*. The Parliament of *Paris* did not condemn her as the *Dutch* ship of *Amsterdam* by her *Dutch* name; but as "*The Three Graces* of *Liverpool*." Indeed she had none of the requisites of a *Dutch* ship; and the regulations require that she should have been into the port of the purchaser, in order to transfer the property; the knowledge of all which circumstances the insured, by his warranty, took upon himself. I am, therefore, of opinion, that the warranty was false."

[*715]

The rule to set aside the nonsuit was accordingly discharged.

It has also been determined, that where no special ground at all is stated: but the ship is condemned generally as good and lawful prize, the Court here must consider it as conclusive evidence that the property was not neutral, and

will not again open the proceedings of the Court abroad in favour of the party, who has warranted his property to be neutral.

An action in the case of *Saloucci* v. *Woodmas* (*a*) was brought upon a policy of insurance on goods warranted neutral on board the *Thetis*, a *Tuscan* ship, to recover the amount of the insurance from the underwriters. The ship had been taken in the course of her voyage by a *Spanish* vessel, carried into *Spain*, and her cargo was there condemned "as good and lawful prize." There was an appeal to a superior Court, which reversed the sentence: but upon a further appeal, the latter decision was overturned, and the former confirmed. At the trial of this cause before Lord *Mansfield*, his Lordship being of opinion that the sentence of the *Spanish* Court of Admiralty was conclusive evidence of the falsehood of the plaintiff's warranty, the plaintiff was nonsuited. A motion was made, and fully argued, to set aside the nonsuit, which was unanimously refused by the whole Court of King's Bench.

*Lord *Mansfield*.—"The policy here warrants that this cargo was neutral property. It appears from the policy itself, that the [*716] ship was neutral, because it is called a *Tuscan* ship: but the warranty is that the goods are neutral. It must be presumed from the condemnation, as no other cause appears, that it proceeded on the ground of the property belonging to an enemy. In the case of *Bernardi* v. *Motteux*, the decision of the Court turned upon the particular ground of the confiscation appearing on the face of the sentence; and that it did not appear to be on the ground of being enemy's property. This being so, the Court gave the party an opportunity to shew by evidence, that the specific ground was really the cause of condemnation. In this case, at *Guildhall*, the counsel admitted the general rule, but they said, if a copy of the proceedings could be had, a special cause would appear. The proceedings are now come; and from them it appears, that the question turned entirely upon the property of the goods. For in the second Court, to which they appealed from the sentence of the first, the question was, whether the goods were free? the decree was, that they were. But the third Court overturned the decision of the second. It is sufficient, however, that no special ground is stated; and therefore the rule must be discharged."

And in the case of *Geyer* v. *Aguilar*, (*b*) if a foreign Court of Admiralty condemns a ship (warranted *American*) as enemy's property, for not having on board a *role d'equipage* or list of the crew, which is required by a *French* ordinance to be on board the ship, and which the Court of Admiralty adjudged to be requisite within the meaning and construction of the treaty between the two countries of *France* and *America*, the Court of King's Bench held that the adjudication in *France* was conclusive against the warranty, that she was an *American* ship, though in fact she was so, that point being clearly within the jurisdiction of the foreign Court.

And where, as in the case of *Rich* v. *Parker*, (*c*) there *has [*717] been no sentence of condemnation, if a ship is warranted *American*, and sails without such a passport, as is required by the treaty between *France* and *America*, the warranty is not complied with, and the underwriters are discharged; even though the ship suffers no inconvenience from the want of it. Such a warranty does not mean merely that the ship is *American* property, but that she is entitled to all the privileges of an *American* flag.

But in *Christian* v. *Secretan* (*d*) where there was no warranty of being *American*, a sentence adjudging a ship to be good prize, as belonging to the enemies of the Republic, negatives no fact, which it was incumbent on the

(*a*) B. R. 24 Geo. 3. Park Ins. 727.
(*b*) 7 T. R. 681.
(*c*) 7 T. R. 703.
(*d*) 8 T. R. 192.

assured, having made no warranty, to establish; for the *English* Courts are only bound by the decretory, or concluding part of the sentence, and where the adjudication is on the ground of enemy's property, are not bound to examine the premises that lead to the conclusion. If, indeed, there had been a warranty, the adjudication that it was enemy's property would have been conclusive against such a warranty.

In the case of *Dawson* v. *Atty*, (*e*) where goods were insured on board the *Hermon*, without any addition of country or place, and not represented to be of any particular country at the time of subscribing the policy, although the broker, when the slip was subscribed, had said she was an *American*, it was held that, though she was, in fact, an *American*, she need not, under these circumstances, be documented as such to entitle the assured to recover against the underwriters for a loss by capture, and subsequent condemnation, for want of the documents required by treaty between her own and the capturing state; for she was neither insured as *American*, nor represented to be such at the time when the policy was affected, though her being so was mentioned when the slip was signed.

But this was an assured on goods, who is not liable on an implied warranty
[*718] to see that the ship is properly documented: *it is otherwise if the owner of a ship is insured, *Bell* v. *Carstairs*. (*a*)

But in a subsequent case at *Nisi Prius*, Lord *Ellenborough* thought that a representation made by the insurance broker, when the names are put on the slip, is binding, unless qualified or withdrawn between that time and the time of the execution of the policy, *Edwards* v. *Footner*. (*b*)

In the cases of *Horneyer* v. *Lushington*, (*c*) and *Oswell* v. *Vigne*, (*d*) it was held that, if a ship be condemned for having simulated papers, no leave being given to carry them, the underwriter is discharged. But it is otherwise if leave be given, *Bell* v. *Bromfield*. (*e*) These cases answer the question of Lord Chief Justice *Mansfield*, in *Steele* v. *Lacy*, (*f*) as to the propriety of carrying them.

If the ground of decision appear to be not on the want of neutrality, but upon a foreign ordinance, manifestly unjust, and contrary to the laws of nations, and the insured has only infringed such a partial law; as the condemnation did not proceed on the point of neutrality, it cannot apply to the warranty so as to discharge the insurer.

In *Meyne* v. *Walter*, (*g*) on a policy of insurance, the ship was warranted to be *Portuguese*, and having been taken in her voyage by a *French* privateer, she was carried into *France*. The Court of Admiralty condemned her, because she had an *English* supercargo on board. It appeared that there was a *French* ordinance, prohibiting any *Dutch* ship from carrying a supercargo belonging to any nation at enmity with the Court of *France*. In an action against the underwriter these facts appeared, upon which a verdict was found for the plaintiff, subject to the opinion of the Court upon this question,—Whether the circumstance of having an *English* supercargo was a breach of neutrality, and whether such a sentence was conclusive?

[*719] *Lord *Mansfield*.—"It is an arbitrary and oppressive regulation, contrary to the law of nations, and there is no proof that the plaintiff knew anything of it. If you were both ignorant of it, the underwriter must run all risks; and if the defendant knew of the edict, it was his duty to inquire

---

(*e*) 7 East, 367.
(*b*) 1 Camp. 530.
(*d*) 15 East, 70.
(*f*) 3 Taunt. 285.
(*g*) B. R. Easter Term, 22 Geo. 3. Park Ins. 730.
(*a*) 14 East, 374.
(*c*) 15 East, 46.
(*e*) 15 East, 364.

if there was such a supercargo on board. It must be fraudulent concealment to vitiate a policy. But it is remarkable that neither party has said anything of the treaties between *France* and *Portugal;* neither party seems to know anything about them, and yet the whole case turns upon them." Judgment for the plaintiff.

So as in the case of *Siffkin* v. *Lee*, (*a*) if a ship be restored, but damages and costs denied to the claimants, because they had not fully complied, as to their documents, with certain *French* ordinances, the assured may recover for the detention notwithstanding.

So also in the case of *Pollard* v. *Bell*, (*b*) which was an insurance on goods on board the ship *Juliana*, "warranted a *Dane*," on a voyage from *London* to *Teneriffe*, with liberty to touch at *Guernsey* and *Madeira*, for account of persons resident at *Teneriffe;* and the loss was declared to be by capture. At the trial, a verdict was found for the plaintiff, subject to the opinion of the Court upon a case which stated that the ship was a *Danish* ship, and the property of *Danish* subjects, and, previous to the voyage insured, had a passport, signed by the King of *Denmark*, for a voyage from *Copenhagen*, to ports in the *East Indies*. Eggleston, the captain of the ship, sailed from *Copenhagen*, on the 23rd of *June*, 1796, having on board a cargo of tar, pitch, &c., and arrived in the *Thames*, according to verbal orders from his owners, 23rd *July*, 1796. During his stay he took on board goods for the owners, besides those in question, and having taken out clearances for *Madeira* and *Guernsey*, sailed, arrived at the latter place, and, after sailing from thence, was captured by a *French* privateer, and carried into *Bourdeaux*. At the *time of [*720] the capture, and during the whole voyage, the *Juliana* had on board the passport, and every other document usually carried by *Danish* ships. She had also a *role d'equipage*, containing the names and places of nativity of the officers, but not of the crew, only stating the latter generally to be sixty men of colour. Captain Eggleston was born in *Scotland*, of *British* parents. He was not naturalized in *Denmark;* but on the 6th of *October*, 1794, posterior to the war between *England* and *France*, he obtained letters of burghership in *Denmark*, but had no domicile, never having resided there.

Proceedings were instituted at *Bourdeaux*, before the Tribunal of Commerce, which condemned the ship and cargo, except one bale, belonging to the captain, as prize. From this sentence Captain Eggleston appealed to the Civil Tribunal of *La Gironde*, where there was a general sentence of condemnation. These sentences referred to several *French* ordinances, particularly the one alluded to in *Meyne* v. *Walter*, of 1778, by which it is declared that all ships shall be confiscated "wherever there shall be found on board a supercargo, merchant, commissary, or chief officer, being an enemy." It is not necessary to state these sentences, because the Court of King's Bench were of opinion that the effect of those sentences, and particularly of the ultimate sentence now to be mentioned, was to condemn, not on the ground that the property was not neutral, but because the circumstance of the captain, being a *Scotchman*, was a violation of this ordinance. From the two former sentences the captain appealed to the Supreme Tribunal of Cassation at *Paris*, which decreed as follows:—"Having heard the parties, the Tribunal, considering that it has been fully proved by the confession of Captain Eggleston, and ascertained by the Judges of *La Gironde*, that the said Captain Eggleston was born in *Scotland*, and an enemy; that his denization in a neutral country was not justified according to law; that his quality of enemy sufficed to legitimate the prize; that the fact of Captain Eggleston being a *Scot* and an enemy, existed independently of the papers on

(*a*) 2 N. R. 484. (*b*) 8 T. R. 434.

[*721] board; that in consequence *all remedies of nullity drawn either from the withdrawing of some of the papers on board, or from the non-application of the seal to the bag wherein they were inclosed, cannot give any ground to cassation; rejects the request of Captain Eggleston, and condemns him to the fine of 150 francs." After this case was twice argued,

Lord *Kenyon*, C. J., said.—"This is an action on a policy of insurance on goods on board a ship warranted to be a *Danish* ship: a loss having happened, the defendant resists the plaintiff's claims, because (he says) the ship in question was not what she was warranted to be, *Danish:* and I agree with the defendant, that the meaning of the warranty was not merely that the ship was *Danish* built, but that she ought to be so circumstanced during the voyage as a *Danish* ship ought to be. This does not appear to me to be a case of difficulty, though it is of great importance to the public. This is one of the numberless questions that have arisen in consequence of the extraordinary sentences of condemnation passed by the Courts of Admiralty in *France* during the war. I do not think they were characterised too strongly at the Bar, when it was stated they all proceeded on a system of plunder; but still, until the Legislature interferes on this subject, we, sitting in a Court of Law, are bound to give credit to the sentences of a competent jurisdiction. If, therefore, in this instance, the *French* Courts had condemned this ship, on the ground that it was not *Danish* property, we should have been concluded by that sentence in this action, and must (however reluctantly, it being stated as a fact in the beginning of the case that it was a *Danish* ship) have given judgment for the defendant. This is proved by the different cases cited in the argument, with the decisions in which I concur, and it is supported by reason. To a question asked in the course of the argument, What are the rules by which Courts of Admiralty profess to proceed?—I answer, the law of nations, and such treaties as particular states have agreed should be engrafted on that law. It was said,

[*722] however, by the defendant's counsel, that an *arret* has the same force as *a treaty; but, without stopping to enlarge on the difference between them, it is sufficient to say, one is a contract made by the contracting parties, and the other is an *ex parte* ordinance made by one nation only, to which no other is a party; and I concur with Lord *Mansfield* in opinion, that it is not competent to one nation to add to the law of nations by its own arbitrary ordinances without the concurrence of other nations. That is the ground on which this case must be decided. Now let us see what was the foundation of the condemnation in the *French* Courts? It is stated in one of the sentences that, by their own ordinances, all ships are to be confiscated, "whensoever on board these ships shall be found a supercargo, merchant, commissary, or chief officer, being an enemy." But I say they had no right in making such an ordinance to bind other nations. Then was the ship in question condemned on the ground that she was not *Danish* property? Certainly not. A vast variety of circumstances, wholly irrelevant, are set forth in the sentences; but it appears, beyond all doubt, that the ship was at last condemned on the ground that the captain was one of those persons whom, by their own ordinance only, they wished to proscribe. This case cannot be distinguished from that of *Meyne* v. *Walter*, (*a*) though, even without the authority of that case, I should have had no hesitation in deciding in favour of the plaintiff. On the whole, therefore, I am of opinion, that though, if contrary to justice, the ship had been condemned, simply because she was not a *Danish* ship, we should have been concluded by that sentence, yet as the Courts abroad have endeavoured to give other supports to their judgments which do not warrant it,

(*a*) *Ante*, p. 718.

and have stated, as the foundation of the sentence of condemnation, one of their own ordinances, which is not binding on other nations, this sentence does not prove that the ship in question was not a neutral ship; and, consequently, the plaintiff is entitled to recover."

Lawrence, J.—"The question is, whether the sentence has negatived the warranty of neutrality? The warranty of neutrality [*723] does not induce any necessity to comply with the peculiar regulations of the belligerent powers. For if a ship be captured, and the question be, whether she be neutral or not, the general rule for judging and deciding on that point is the law of nations, subject to such alterations and modifications, as may have been introduced by treaties: but where the law of nations has not been varied or departed from by mutual agreement, that is the general rule for deciding all questions on matter of prize. This is clearly laid down in a state paper signed by Sir George Lee, Dr. Paul, the King's Advocate, and Sir D. Ryder and Mr. Murray, the Attorney and Solicitor General, in answer to the *Prussian* memorial concerning neutral ships. (*d*) When, therefore, a state in amity with a belligerent power has by treaty agreed that the ships of their subjects shall only have the character when furnished with certain precise documents, whoever warrants a ship, as the property of such subject, should provide himself with those evidences which have by the country to which it belongs been agreed to be the necessary proof of that character. In requiring this, no difficulty is imposed, of which the assured is not aware, and which may not be in his power to prevent: but to require of him to furnish himself with every document the belligerent powers may require, and to insist that the warranty is not complied with, unless the ship be navigated according to their ordinances and regulations, would be to deprive the assured of his indemnity for the want of papers, &c., of the necessity of which he may fairly be presumed ignorant, and which papers it may not be in his power to procure: for how can the officers of one country be called on to grant that, which the laws of their own country do not require? These *French* decrees are regulations made with some views to the laws of *France*, *but are not applicable to the [*724] subjects of any other country. In examining the cases decided on this point, it will not be found that there is any determination of the Court to support what has been insisted on by the defendant: but on the contrary, it has been settled in many cases, that a condemnation on the particular ordinances of a belligerent power is no violation of a warranty of neutrality. In the case of *Bernardi* v. *Motteux*, (*a*) the ship *Joanna* was warranted neutral; the only doubt was, whether the ship were condemned as being the property of an enemy, or for violating a *French arret* by throwing papers overboard; for the one or the other of those causes she was condemned. If she were condemned for the first, namely, that she was not neutral, the plaintiff clearly could not have recovered: nor could he have recovered if she were condemned on the other ground, according to the argument of the defendant in this case: but it is clear, that the Court did not, in that case, adopt the defendant's argument here, because the plaintiff did recover in that case, it not being certain that the ground of condemnation was, that the ship was the property of an enemy. [The learned Judge here also commented on the case of *Barzillay* v. *Lewis*, (*b*) and on *Saloucci* v. *Johnson*, (*c*) and *Meyne* v. *Walter*, (*d*) and then proceeded.] The argument of the defendant here is, that the sentence of condemnation is conclusive on the point that the ship was not navigated according

(*d*) *Vide* Collectanea Juridica, 1 vol. 33, and 2d Postlethwaite's Dictionary, 7, 5, article Silesia.

(*a*) *Ante*, p. 712. (*b*) *Ante*, p. 713.
(*c*) *Ante*, pp. 307, 707, and *post*. (*d*) *Ante*, p. 718.

to the contract between the parties: the contract between the parties is that she was a neutral ship, but the sentence has not decided that point; it has only decided that she was not navigated according to the ordinances of *France*, but that was no part of the plaintiff's contract. In deciding this case, in favour of the plaintiff, we do not take upon ourselves to say that the sentence of the *French* Court of Admiralty is erroneous: all that we determine is, that the *French* Court has not decided that, which would be a breach of the warranty of the neutrality. On the *whole, I think it clear that the ship in question was condemned for acting in contravention of *French* ordinances, and that does not falsify the warranty of neutrality."

[*725]

The next case upon this subject, is that of *Bird* v. *Appleton*, (*a*) which has already been mentioned for another point in a former part of this Treatise, and was an insurance on the ship *Confederacy*, an *American* ship, at and from *Canton* in *China* to *Hamburgh* or *Copenhagen:* and at the trial a special verdict was found, the facts of which, as far as this point requires the statement of them, were, "that the ship *Confederacy* was an *American* built ship, the property of *American* subjects; that the ship sailed from *Canton* towards *Hamburgh* with the goods on board in *January*, 1797, having on board a passport duly made out and granted according to the form annexed to the treaty of commerce between *France* and *America*, and during her voyage was captured by a *French* ship of war, and carried into *Nantz;* where proceedings being instituted before the tribunal for determining questions of prize, the ship and cargo were condemned as prize." The sentence began with the following considerations: "Considering that although it appears by reading and examining the documents, and by the declaration of the captain, supercargo, and the greatest part of the crew, that the ship *Confederacy* has not ceased to be neutral property, and belonging to neutral citizens and subjects of the *United States* of *America:* considering that although by the same documents and declarations, it is equally evident and proved that the goods shipped were laden by neutral citizens for account of neutral citizens: considering that, notwithstanding these favourable presumptions, nothing can exonerate the captain and supercargo from having regular despatches, in order to prove the neutrality of the ship." The sentence then proceeds to recite certain *French* ordinances, which declare to be good prize all neutral vessels not having on board a list of the crew attested by the public officers of the neutral *places. It then says, "considering that so far from derogating from the general regulations for all nations in favour of the *Anglo-Americans* by the treaty of *February*, 1778, it implicitly subjects them to it by the 25th and 27th articles, which oblige them to conform to the model of the passport annexed to the treaty." It also states a law of the Convention, and another of the Executive Directory of the 12th *Ventose*, of the fifth year, which latter recites the ordinances of 1774 and 1778, and declares that all *American* vessels shall in consequence be good prize, which shall not have on board a list of the crew in due form, such as is prescribed by the model annexed to the treaty between *France* and *America* of 1778. The sentence then concludes thus: "The tribunal, in conformity to the above-mentioned laws and regulations, and particularly the decree of the Executive Directory of the 12th *Ventose*, fifth year, adjudges and declares the validity of the prize of the foreign ship the *Confederacy*, and all the goods and effects composing the lading or cargo of the ship, in default of the captain and supercargo being regular in their list of crew and despatches." The special verdict also found that ships belonging to *America* never did at any time prior to the capture in question carry with them lists of their crew attested in the

[*726]

(*a*) 8 T. R. 562. *Ante*, p. 635.

manner required by the ordinances referred to; and that *America* has always insisted, and still insists, that her ships are not, by treaty or otherwise, bound or obliged so to do.

This special verdict was argued several times upon the various points that arose upon it; and the Judges afterwards delivered their opinions unanimously, as to this point in favour of the assured, namely, that the *French* sentence did not decide that the ship was not neutral.

Lord *Kenyon* said.—"After the greatest attention I have been able to bestow on the subject, I adhere to the opinion that we gave in the case of *Pollard* v. *Bell*, (*a*) and that decision is directly in point to the present case." His Lordship *then adverted to particular parts of the sentence, which it is unnecessary here to consider; but concluded that it was manifest [*727] from an attentive consideration of the whole sentence, that the single ground, on which it proceeded, was that mentioned in the concluding part of the sentence, namely, "in default of the captain and supercago being regular in their list of crew and their despatches." Now that is neither required by the law of nations, or by the treaty between *France* and the *United States* of *America*, and it is found by the verdict that all the requisites of that treaty were complied with. The rest of the Court concurred. Judgment for the plaintiff.

In a subsequent case of *Price* v. *Bell*, (*b*) upon a special verdict, the insurance was on a ship and goods, the ship being in fact an *American*, but not warranted to be so, and the case seems to turn, not on the point of enemy's property, but on this, whether the ship was documented as an *American* ship ought to have been according to its own laws and its treaties with other countries. She was provided with a passport, such as is constantly used by all *American* ships, and all other usual papers and a new muster-roll, made upon oath before the Lord Mayor of *London*, several of his original crew having died, but all the new men being *Americans*, and signed and certified by the *American* minister, having left the original muster-roll with the said minister. The ship sailed from *London* bound for *Charlestown*, the voyage insured, and was captured by a *French* privateer and carried into *L'Orient*. The sentence of the first tribunal stated the questions of law to be, Whether the new muster-roll was in the legal form to supply the first list? And secondly, Whether the bills of lading and other papers touching the cargo prove the neutral property of it? It then proceeds with various considerations, of violated ordinances of *July*, 1778, and a decree of the Executive Directory promulgating the ordinances of 1744 *and 1778, and decrees the ship and cargo to be good prize: although one of the considerations is to this effect, [*728] considering in law that the register and sea-letter prove the *American* property of the ship, but the log-book proves that the passport has served for several voyages, contrary to the formal regulations of the fourth article of the ordinance of *July*, 1778. From this sentence the captain appealed; but the superior Court declared the former sentence valid, adding to the former ordinances a law of the 29th *Nivose* last, expressing, "the state of ships in regard to what concerns their neutral or enemy's quality shall be determined by their cargo; therefore every vessel met at sea laden entirely or in part with goods the produce of *England*, shall be declared lawful prize, whoever may be the owner." This special verdict was argued three several times at the Bar, and the Court took time to consider of their opinion, it appearing that the main difficulty of the case turned upon the question of an implied warranty, there being no express one.

(*a*) *Ante*, p. 718. (*b*) 1 East, 663.

The Court did not decide that point, for they were ultimately of opinion, as was declared by Lord *Kenyon* in pronouncing their unanimous judgment, that supposing an implied warranty did exist, the sentences did not negative such a warranty, both the sentences appearing manifestly to have proceeded on the ground of a breach of *French* ordinances, which were contrary to the treaty between the two countries, were not adopted by it, nor is the condemnation expressed by the sentence to have been for acting contrary to the treaty. Judgment for the plaintiff.

But where the foreign sentence professes to proceed on the ground of an infraction of treaty, such sentence is conclusive against the warranty, although inferences were drawn in such sentence from *ex parte* ordinances in aid of their conclusion that the treaty was broken, *Baring* v. *Royal Exchange Assurance Company*. (*a*)

[*729] We come now to refer to a more important case than any *preceding one, namely, *Kindersley and others*, *Appellants*, v. *Chase and others*, *Respondents*. (*b*) It was an insurance effected at *Madras* by the appellants on account of the *Swedish Asiatic Company*, on the ship *Resolution*, Captain Neale, and the insurance was declared to be on goods, as interest may appear, and warranted *Swedish* property. The ship sailed with a valuable cargo, and being obliged to put into the *Isle of France* for refreshment, the ship and cargo were there seized as prize, and ultimately condemned. The tribunal of commerce in the *Isle of France*, after enumerating the various papers and documents found on board, proceeds to state, "That the legal questions for investigation and decision are, first, whether the proceedings in regard to the fact of the seizure of the ship were carried on agreeably to the terms of the laws relative to proceedings in matter of prize? 2nd, Whether by the papers composing the said proceedings, and there produced by the respective parties, and also from the objections and exceptions severally taken, and by the terms of the regulations and ordinances made on the subject of the navigation of neutral vessels in time of war, the said ship and her cargo must be considered as enemy's property, and as such confiscated to the use of the republic; or whether, on the contrary, the said ship and her cargo must be considered as *Swedish* property, and restored to the claimants?" The sentence as to the second question proceeds thus:—"Considering that it appears, as well by the confession of the master on his examination, as by the declaration of the passengers and others of the crew, that he is an *Englishman* by birth. Considering that the character of a naturalized *Swede* adopted by him in the proceedings cannot be legally entertained; seeing that instead of providing by letters of naturalization from the King of *Sweden*, he only produces an act of his having taken the oath on the 14th *July*, 1795, before the Burgomaster of *Gottenburg*, which is insufficient by reason that every act of nationality or

[*730] neutralization can only *be proved, according to the usage of the *European* powers, by an act issued by the prince himself. Considering that, even though this certificate of the oath having been taken, should be considered as equivalent to letters of naturalization, granted by the King of *Sweden*, it would want the condition required by law for its validity, as it could only have been made two years subsequent to the declaration of war with *England*, and would consequently be directly opposite to the words of the 6th article of the regulation of neutrals in 1778, which are as follow:—"No regard will any more be paid to passports granted by neutral powers or allies, as well to owners as masters of ships, subjects of states in enmity with his Majesty,

(*a*) 5 East, 99.
(*b*) Cockpit, July 21 & 22, 1801. Park Ins. 743.

if they are not neutralized, or have not transferred their property to the states of those powers three months before the 1st of *September* of the present year." Considering that it also appears, as well by the proceedings as by the declaration of the crew, and that of Mr. Gordon, that the said Gordon is a *Scotchman*, consequently an enemy; that he was second captain on board the said ship *Resolution*, and that he certainly exercised the functions thereof from the period of his leaving *Europe*, and during the whole of the voyage; that this first officer was shipped at *Guernsey* without any of the forms prescribed by law being observed, for proving the disembarkation of the person mentioned in the muster-roll, as likewise the necessity of replacing him with an officer of an hostile power. Considering that the regulation of 1778, declaring lawful prize foreign vessels, on board of which there shall be a supercargo, merchant, clerk, or principal officer of an enemy's country, save in those cases as excepted in the 10th article, where the papers shall prove by documents found on board, that they were under the necessity of taking on board chief officers or sailors, at the ports they put into, to replace those belonging to a neutral country, which died in the course of the voyage; and the defendants do not in any manner prove it, agreeably to the directions and regulations. Considering that the general invoice and bill of lading produced by the captain, the particular *invoice of the cargo made by Kindersley, Watts and Company, [*731] and Colt, Day and Company, of *Madras*, being unsigned, cannot be received by the Court conformably to the 2nd article of the same regulation. Considering that the papers produced by Captain Neale, as well to establish the pretended character of an *American*, as likewise to prove the existence of the necessity he was in to replace, at *Guernsey*, the first officer inserted in the muster-roll by Mr. Gordon, are neither sufficient nor legal; and that even admitting them to be so, they could not be received by the Court, by reason that they were not delivered within the time prescribed by the terms of the 11th article of the same regulation. Considering that the cargo shipped by Harrop and Stephenson, of *Tranquebar*, is for account of the operations of the ship *Resolution*, as appears by account current of the said gentleman, of the 29th of *March*, 1797. Considering, finally, that the king's letters of the 23rd of *May*, 1780, issued by order of the colonial assembly, and registered in the Tribunal, as forming part of the regulation of 1778, has no other object than to maintain the directions of the regulations, and to recommend circumspection to captains of armed ships towards neutral vessels. Everything considered, the Court administering justice, and without paying attention either to the points and demands, or to the matters of nullity contended for by the defendants in regard to the proceedings taken by the justice of peace, declare the seizure of the ship *Resolution* to be good and lawful, order the said ship and cargo to be condemned for the use of the republic."

This case came on to be tried on the plea side of the Recorder's Court at *Madras;* and a verdict was given for the appellants, subject to the opinion of the Court upon a case reserved upon the single point as to the effect or operation of the sentence of the Court of Admiralty in the *Isle of France*, the Recorder, (Sir *Thomas Strange*) being of opinion at the trial, that independently of the *French* sentence, the appellants had made out a sufficient case to entitle them to a *verdict. Upon the argument of this case, Sir *Thomas Strange* gave judgment for the respondents, stating as a ground of [*732] his decision, that the Admiralty Court had considered the question, whether the property was enemy's or neutral, and had condemned it as enemy's, and consequently the warranty was conclusively disproved by that sentence.

From this judgment the present appeal was brought, and after elaborate argument at the Bar, the Lords of the Privy Counsel dismissed the appeal, and their judgment was pronounced by

The *Master of the Rolls* (*a*)—"It is necessary to make a few observations, to shew the grounds upon which our opinion proceeds, confirming the judgment of the Recorder of the Court at *Madras*.

"The opinion which we have formed as to the effect of the sentence of condemnation makes it unnecessary for us to go into the consideration of all the questions that have been raised in the course of the discussion. With regard to one, which was started towards the conclusion of the argument, whether a sentence of condemnation in an Admiralty Court can ever, in a Court of Common Law, be held to falsify a warranty in a policy of insurance of one who is no party to it? I think it is not open to make that question. Till now, no objection has been made on the part of the appellants to the sentence as evidence, their *gravamen* was, not that it was received for the purpose for which it was offered, but that being received, it did not show that the condemnation proceeded on the ground of enemy's property: that was the sole question agitated in the Court below. Supposing it had been open to raise that question, I conceive it must here, at least, have been raised in vain; for, sitting here as a Court of Appeal, from a Court of Municipal Law, we must decide according to those rules, which we find established for Courts of Municipal Law; and therefore we must decide *a question on a policy of insurance, in the same manner as we find a Court in *Westminster Hall* would have decided such a question. Now it is quite clear that from the time of Lord *Hale* down to the present period, it has been settled that a sentence of condemnation in a Court of Admiralty is conclusive. When it proceeds on the grounds of enemy's property, it is conclusive that the property does belong to enemies, not only for the immediate purpose of such a sentence, but it is binding on all Courts and as against all persons. (*b*) This has been so clearly understood, that it was not even controverted in the case of the Duchess of *Kingston*, where the conclusive effects of all sorts of evidence was so ably discussed. It was admitted that the sentence of a Court of Admiralty, proceeding *in rem*, must bind all parties—must bind all the world. Now, taking a sentence to be conclusive, when it has distinctly determined that the property belonged to enemies, a question is made, Whether this sentence is to produce this effect? It is said every sentence of condemnation does not produce that effect, because, by a great many decisions, it has been now established that if it clearly appears on the face of the sentence that it was not on the ground of enemy's property that the condemnation proceeded, but that the Court bottomed itself on some distinct ground, in that case the warranty of neutrality is not necessarily falsified by such a sentence of condemnation; and certainly there are several cases that have so decided. I have looked at them all, and not one of them will be contradicted by our decision on this case. It is generally to be presumed that such sentences proceed on legitimate grounds, and, therefore, they are in general conclusive proof, with respect to the property, negativing the warranty of neutrality, and proving the propriety of the condemnation. (*c*) Hence it follows that it does not lie on the party producing the sentence to show that it has proceeded on the ground of enemy's *property; but it is incumbent on the other party, who objects to the sentence, to show that it proceeded on some other ground. That I take to be the effect of these decisions, and therefore it is necessary here to show some distinct and collateral ground on which the sentence has proceeded, leaving the question of property entirely undetermined; and accordingly in every one of

[*733]

[*734]

(*a*) Sir William Grant.
(*b*) And see per Lord Mansfield in Bernardi v. Motteux, *ante*, p. 712.
(*c*) See per Lord Kenyon, and J. Grose, in Pollard v. Bell, *ante*, p. 718.

the cases in which the effect contended for by the underwriters has been denied to a sentence of condemnation, the Court of Common Law has thought itself warranted in coming to this conclusion, that the sentence itself shows that the question of property was not, and was not professed to be, decided by the Court of Admiralty. What is the case here? The Court expressly tells us what the questions were which they had to decide—One question was, 'Whether the proceedings were regular?' The other question was, 'Whether, by the papers composing the said proceeding, and there produced by the respective parties, and also from the objections and exceptions severally taken, and by the terms of the regulations and ordinances made on the subject of the navigation of neutral vessels in time of war, the said ship and cargo must be considered as enemy's property, and as such confiscated to the use of the republic? Or whether, on the contrary, the said ship and her cargo must be considered as *Swedish* property, and restored to the defendants?'

"Whether it was to be confiscated, according to that statement, depended, as they say, on the question whether it was the property of enemies or of neutrals? If it was property of enemies, then it was to be confiscated, but if the property of neutrals, it was to be restored to the defendants. Then we find them determine that it is to be confiscated for the benefit of the republic. Now we must strain very hard to make them contradict themselves in pronouncing the sentence of condemnation, if we say that they did not mean to determine anything with respect to the property, when at the same moment they said, the sentence depended entirely on the question of property. It is said, it appears from one of the *reasons of their decision, that they must have proceeded on the ground of their own ordinance, particularly on [*735] the ordinance of 1778, which declares, 'that the circumstance of having a supercargo or chief officer on board belonging to an enemy will be a sufficient ground of condemnation.' Now, supposing for a moment it was chiefly, for certainly it was not solely, through that medium that they arrived at the conclusion that it was enemy's property, would that have been sufficient to authorize us to treat the sentence as inconclusive?

"Supposing they had stated the facts of the case, without any reference to the ordinance, could any man say that these facts were so irrelevant to the conclusions they have drawn of enemy's property that a Court of Common Law would have thought itself at liberty to go into the question, and see whether the conclusion was warranted or not? The Court of King's Bench has always disclaimed such a jurisdiction. Then does it vitiate the sentence that a Court of competent jurisdiction has said, there is an ordinance which warrants and supports such a sentence? These ordinances have been misunderstood, sometimes by the Courts of Admiralty themselves in *France*, and even (sometimes) by the Courts in this country. The Courts of Admiralty in *France* have sometimes considered these ordinances as making the law, and as binding on neutrals, and therefore sometimes have declared in the same breath that the property was neutral, and yet that it was liable to condemnation. Whereas all that was meant by those ordinances was, to lay down rules of decision conformable to what the lawyers and statesmen of the country understood to be the just principles of maritime law. When Louis the Fourteenth published the famous ordinance of 1681, nobody thought that he was undertaking to legislate for *Europe*, merely because he collected together and reduced into the shape of an ordinance, the principles of the marine law as then understood and received in *France*. I say, as understood in *France*, for although the law of nations ought to be the same in every country, yet as the tribunals which *administer that law are wholly independent of each other, it is [*736] impossible that some differences shall not take place in the manner of interpreting and administering it in the different countries which acknowledge its authority.

Whatever may have been since attempted, it was not, at the period now referred to, supposed that one state could make or alter the law of nations; but it was judged convenient to declare certain principles of decision, partly for the purpose of giving an uniform rule to their own Courts, and partly for the purpose of apprising neutrals what that rule was. And it was truly observed at the Bar, in the course of the argument, that it has been matter of complaint against us (how justly is another consideration) that we have no such code, by which neutrals may learn how they may protect themselves against capture and condemnation. Now this Court, in this case, seems to me to have well and properly understood the effect of their own ordinances. They have not taken them as positive laws binding on neutrals, but they refer to them as establishing legitimate presumptions, from which they are warranted to draw the conclusion that is necessary for them to arrive at, before they are entitled to pronounce a sentence of condemnation.

"Supposing they had only stated the facts, as they are now before us, are they to be considered as so irrelevant, that a Court of Common Law would say, 'This sentence is repugnant to justice, and is unwarranted on the ground on which it has proceeded?' [The Master of the Rolls here enumerated the facts appearing on the *French* sentence, supposing them to have occurred in a *British* Court of Admiralty, and then proceeded.] "Supposing all these circumstances to be brought before a Court of Admiralty in this country, I think it would be questionable, whether they would have permitted further proof: I apprehend the property would hardly have escaped condemnation in the first instance. What is the result of all the cases that have been determined? From them all, Mr. Justice *Le Blanc* collects this principle, namely, [*737] that a sentence of a Court of Admiralty is conclusive as to all it *professes to decide. (*a*) Now, is it possible to say, that this Court did not profess to decide, whether this was or was not enemy's property? It was the only question they did profess to decide, for there is no other question stated by them upon which their decision could proceed, except that of, Whether the property belonged to enemies or neutrals? And therefore we do not only not contradict any case that has been decided, by affirming the judgment of the Court below, but we are bound so to do, by all the principles of these cases; and we should contradict them if we did not affirm the sentence of the Court of *Madras*."

Lord *Glenbervie*.—"I only wish to make one observation on the case of *Pollard* v. *Bell*. It seems quite otherwise as to the fact in that case, from this which has been so ably stated here; and I entirely concur in opinion, as it has been now delivered. In the case of *Pollard* v. *Bell*, the *French* Court did not profess to go on the ground of enemy's property. Here they do profess to go on the ground of enemy's property. Whether they ought or ought not to have come to this conclusion is another question, but it is clear that in *Pollard* v. *Bell*, that particular Court did not do so: it did not decide on the ground of enemy's property or not; but they declare merely, that the ship is confiscated because she had a belligerent captain or supercargo on board. Now that being the case, and the sentence not having so professed to proceed, the very first fact that was stated in that case was, that the ship was neutral property. The warranty was on the ship, though the insurance was on the goods on board; that being so, it appears that that case is not at all on the facts of it resembling this."

Sir *William Scott*.—"From the case of *Pollard* v. *Bell*, it appears clearly, that the *French* Court of Admiralty had been guilty of great inattention in their

(*a*) *Vide* his opinion in Pollard v. Bell, 8 T. R. p. 443, *ante*, p. 719.

own edicts; but by this inaccuracy they brought the facts out distinctly to the *view of an *English* Court of Common Law, and hereby enabled them to give the decision they had given." [*738]

Mr. J. *Park* here observes, (*a*) "But the point was at that very time depending in the House of Lords, upon an appeal from *Scotland*, in the case of *Lothian and another* v. *Henderson and another*, (*b*) and upon the second hearing of which, all the Judges were summoned. I was one of the counsel, and, by the express order of their Lordships, in order to set this point at rest for ever, we were desired to argue at the Bar in question of the admissibility in evidence of a sentence of a foreign Court of Admiralty, in an action upon a policy of insurance, in order to falsify a warranty of neutrality. And after mature deliberation, although there was some difference of opinion about some special circumstances, all the Judges were unanimous in declaring, that after the continued practice which had taken place from the earliest period, in which, in actions on policies of insurance, questions had arisen on warranties, to admit such sentences as evidence, not only as conclusive *in rem*, but also as conclusive of the several matters they purpose to decide directly, it was too late to examine the practice of admitting them to the extent, to which they had been received, supposing that practice might have at first appeared to have been doubtful, upon the argument, that, on the authority of those decisions, men had acted for a long series of years, and entered into contracts of assurance in this country, with a perfect knowledge of such decisions, and in expectation of the questions arising out of such contracts, to which such decisions are applicable, being ruled by them. And as to the supposed uncertainty that had prevailed in our Courts upon the construction of foreign sentences, Lord *Alvanley*, Chief Justice of the Court of Common Pleas, said, the doctrine laid down in *Kindersley* v. *Chase*, (*c*) appeared to him best calculated to do away that uncertainty,"

*Lord *Ellenborough*, Chief Justice of the King's Bench, who was necessarily absent at *Guildhall* when the House of Lords decided the cause of *Lothian* v. *Henderson*, but whose concurrence in the judgment then pronounced was declared by Lord *Eldon*, (Lord Chancellor) had soon after an opportunity of declaring from the Bench of his own Court what he conceived to be the effect of that decision. In delivering the judgment of the Court in *Bolton* v. *Gladstone*, (*d*) his Lordship said, "Since the judgment of the House of Lords in *Lothian* v. *Henderson*, it may now be assumed as the settled doctrine of a Court of *English* law, that all sentences of foreign Courts, of competent jurisdiction to decide questions of prize, are to be received here as conclusive evidence in actions upon policies of assurance, upon every subject immediately and properly within the jurisdiction of such foreign Courts, and upon which they have professed to decide judicially." [*739]

But it was held in the case of *Fisher* v. *Ogle*, (*e*) they must decide upon the point distinctly, in order to affect a warranty or representation in a policy of insurance. That they meant to decide the point is not to be collected by inference or argument, but by specific affirmation. Lord *Ellenborough* so declared on the trial of an action on a policy of insurance on the ship *Juno*, represented as an *American*, at and from *London* to *Africa*, during her stay and trade there, and from thence to her port or ports of discharge in the *West Indies*.

The ship was captured by a *French* privateer, and carried into *Martinique*, and there condemned in the Vice Admiralty Court. To falsify the represen-

---

(*a*) Page 753.
(*b*) 3 Bos. & Pull. 499.
(*c*) *Ante*, pp. 732, 737.
(*d*) 5 East, 155.
(*e*) Sit. after Trin. 1808, 1 Camp. 418.

tation of neutrality, the defendant now gave in evidence the sentence on condemnation. This stated, "that it resulted evidently from the papers on board; that the expedition of the said ship *Juno*, her cargo, and the operations of her captain on the coast of *Africa*, were for account of the brothers Geddes, merchants of *London*, who had, to masque the *English* property of this outfit, [*740] borrowed *the *American* flag and passport of the said ship *Juno*, and taken for their agent and partner in this expedition, Captain Fischer, furnished with a certificate of a citizen of the *United States*." The sentence afterwards went on to declare as good and valid prize the slave ship *Juno*, and to confiscate the said ship and her cargo to the profit of the captors, without stating any specific grounds for the condemnation.

Lord *Ellenborough*.—"We shew a sufficient respect for *French* sentences, if we attach credit in our Courts to what they distinctly say. It is often painful to go this length, considering the piratical way in which they proceed. But this sentence does not say that the ship was not *American;* and it is not to be considered as evidence of what it does not specifically affirm. I dare say such sentences will be positive enough in future, since those who frame them are disposed to consider every thing as good prize against all mankind. When they do speak out, I will give them the same effect here which they receive in other places. But there is no proof in the present case that the property was not *American*, although such an inference might be drawn from certain indirect statements in the sentence now presented to us." Verdict for the plaintiff.

In the ensuing Term a motion was made for a new trial: and it was contended by the counsel for the defendant, that it necessarily resulted from the terms of the sentence of the *French* Admiralty Court, that the ship *Juno* and her cargo were not *American*, although this was not positively averred in any part of it; and that, according to the principles of former decisions, the sentence of a foreign Court of competent jurisdiction must be taken as conclusive evidence of the facts upon which it evidently proceeds.

Lord *Ellenborough*.—"I must look at the adjudicative part of the sentence; and there I find nothing distinctly stated as to the ship or her cargo not being *American*. Is there any case in which it has been held that Judges must fish [*741] for a meaning, when a sentence of this kind is produced *to them. Here the foreign Court seems not to have any settled opinion upon the subject, and not to have known or cared on what grounds it proceeded to a condemnation. It is by an overstrained comity that these sentences are received as conclusive evidence of the facts which they positively aver, and upon which they specifically profess to be founded."

The other Judges were of the same opinion, and the rule was refused.

In *Calvert* v. *Bovill*, (*a*) which was an action on a policy of insurance on the captain's goods and private adventure, warranted *American* property, on board the ship *Friends*, at and from *London* to *Virginia*, a sentence of a *French* Court of Admiralty was produced, which was to the following effect: "Forasmuch as the true destination of the ship was for the *English* islands, having been hired and loaded at *London*, and that there has been found on board her eighty barrels of gunpowder; the Court declares the said brig *Friends*, together with her cargo, a good prize."

The Court of King's Bench held that this sentence was not conclusive against the warranty of neutrality, the facts of the case and the reasons expressly given, leading to a contrary conclusion. If the sentence, indeed, had condemned the goods, because they were the property of an enemy, that judgment would have been conclusive, but they have given other reasons for their sentence.

(*a*) 7 T. R. 523.

There is an important case on this subject decided so late as 1831: it is the case of *Dalgleish and others* v. *Hodgson*, (*a*) which was an action on an insurance on "goods" on board the ship *George*. It was decided in this case that the sentence of a foreign Court of Admiralty is not conclusive as to the ground of condemnation, unless it be explicitly stated what that ground is: and it was held in this case that this did not appear on a sentence which stated "that *the ship *George* had sailed from *Liverpool*, knowing of the [*742] blockade of *Buenos Ayres*, by the Emperor of *Brazil*, from a short distance from which port she was taken, and for that reason ought to be considered as violating the blockade; besides which, it was notorious that the captured had endeavoured to get goods into *Buenos Ayres*, as was clear from the evasive answers of the captain; that the captured had not the plausible excuse of going first to *Monte Video*, and thereby complying with the published instructions; from all which and from the documents stated, the ship was adjudged good prize." At the trial a verdict was directed to be entered for the plaintiff, subject to the opinion of the Court upon a case. (*b*) After argument, the Court took time to consider their judgment, which was delivered afterwards by *Tindal*, C. J. "The principal question in this case is, whether the sentence of condemnation of the brig *George* and her cargo, in the Prize Court of *Monte Video*, dated the 13th *December*, 1826, is to be received in our Courts as conclusive evidence of the fact, that the ship was captured in attempting to break the blockade of *Buenos Ayres*. For if that is to be taken as a fact conclusively proved, then the plaintiffs in this action are in no condition to recover.

The general law upon this subject is well known, that the sentence of a foreign Court of Admiralty of competent jurisdiction is binding upon all parties, and in all countries, as to the fact upon which the condemnation proceeded, where such appears on the face of the sentence free from doubt and ambiguity. But it is at the same time as well established, that in order to conclude the parties from contesting the ground of condemnation in an *English* Court of Law, such ground must appear clearly upon the face of the sentence: it must not be collected by inference only, or left in uncertainty, whether the ship was condemned upon one ground which would be a just ground of condemnation by the law of nations, or on another ground which would amount only to a breach of *the municipal regulations of the condemning country. [*743] The cases of *Fisher* v. *Ogle*, (*c*) and *Calvert* v. *Bovill*, (*d*) are express authorities to this point, and the sentence of condemnation in the latter case bears a strong resemblance to that in the present. There Lord *Kenyon*, C. J., says, "If, indeed, that Court had stated in their sentence that they condemned the goods because they were *British* property, I should have considered myself bound by that sentence; but they have assigned other reasons for adjudication: the express grounds of the sentence of the adjudication are, that the ship was destined to one of the *West Indian Islands;* that she was hired and loaded at *London*, and had a certain quantity of gunpowder on board; therefore they condemned her and her cargo as a good prize."

Now, looking at the adjudicatory part of this sentence, which is the important part for the discovery of the precise ground for condemnation, it is in these terms, viz: "From all which, and from what the documents state, I judge the said brig *George* and her cargo to be good and lawful prize to the capturers." The words 'from all which' refer us back to the premises, to discover the grounds of the sentence; and in those premises we find enumerated three distinct statements: first, "that it plainly appears from all the documents that

(*a*) 7 Bing. 495.
(*b*) Which see at p. 496 of the Report.
(*c*) 1 Camp. 417. *Ante*, p. 739.
(*d*) 7 T. R. 523. *Ante*, p. 741.

the brig sailed from *Liverpool* knowing of the blockade, and which the captured do not even deny, nor that her destination was *Buenos Ayres*, at a short distance from which she was taken; secondly, that for the reason last given, she ought to be considered as violating the blockade; thirdly, that the ship had not even the plausible excuse of coming to *Monte Video* first, and thereby complying with the published instructions."

Now, upon referring to these premises, we think we cannot safely infer that the precise ground of condemnation was the attempt to break the blockade. The first statement refers to the illegality of the ship's destination from *Liver-*

[*744] *pool* to **Buenos Ayres*, then being under blockade. It is impossible to say with certainty that the sentence may not have proceeded on that ground in part, if not altogether; it is more than probable it did so, for in another part of the premises the Judge reverts to this statement in these terms, "Forasmuch as, besides not doing away the proof that *Buenos Ayres* was the first port the shipment was intended for, in itself criminal." But if this was the ground upon which the sentence proceeded, in the first place, it is no ground for condemnation by the law of nations, unless there was intention to violate the blockade; and in the next place, the sentence leaves untouched the question of fact, whether the blockade was broken or attempted to be evaded? If it formed an ingredient in the *Brazilian* Court of Admiralty, no one can say how much it weighed with them, or that if the ground of condemnation had been out of the case, the Court intended to rely on the fact of the blockade broken as their ground of adjudication. Again, in the latter part of the preamble to the sentence, the Judge refers to a non-compliance with published instructions as a charge against the master of the ship. What these instructions are, does not appear; whether some regulations ordained by their own authority or not is uncertain. But if this, which is no ground for condemnation by the general law of nations (*Meyne* v. *Walter*,) (*d*) operated on the mind of the foreign Judge to condemn the ship and cargo, there is an end again to the conclusive finding of the fact that the ship violated the blockade at *Buenos Ayres*. Under a sentence, therefore, expressed with so much doubt and ambiguity as to the real ground on which it proceeded, we hold ourselves at liberty to determine whether, upon the evidence at the trial, such violation of the blockade did in fact take place or not; and upon that question we are satisfied on the evidence that the captain did not break, nor did he intend to break, the block-

[*745] ade, but that he honestly intended to obtain instructions *from the blockading squadron, not having been before warned off by the *Brazilian* cruisers.

The only remaining objection that has been insisted on against the plaintiff's right to recover is, that the voyage in question was an illegal voyage in its commencement, because the ship was destined to a port which was notified to be under blockade. But that this was not an illegal voyage was determined by the Court of King's Bench, (*a*) upon a voyage described in the policy in the very same terms as the present, and under circumstances so precisely similar that it is unnecessary for us to say more than that we entirely concur with the judgment there given, founded upon the authority of Lord *Stowell's* judgment, in the case of the *Shepherdess*. (*b*) Judgment for the plaintiffs.

(*d*) East, 22 Geo. 3. Park Ins. 730. *Ante*, p. 601.

(*a*) Naylor v. Taylor, 9 B. & C. 718. *Ante*, p. 317.

(*b*) 5. Rob. Ad. Rep. 262: *ante*, p. 315. See also the cases of the Neptunus, 2 Rob. 110; and of the Adelaide, 2 Rob. 112, (n), *ante*, p. 315. And see the case of Harratt v. Wise, 9 B. & C. 712, *ante*, p. 315, where this subject relating to the blockade is fully treated of.

In the case of *Saloucci* v. *Johnson*, (*c*) which has been already referred to, one of the main points related to the question respecting the right of searching neutral vessels, which was decided in the negative. But that decision has been overruled by the Court of Admiralty and by the Court of King's Bench, in 1799, in the case of *Garrels* v. *Kensington*. (*d*) It was an action on a policy on goods in the ship *Dispatch*, warranted *Danish* ship and property. The loss was alleged to be by capture. A sentence of a *British* Court of Admiralty was produced, stating that the said neutral ship *Dispatch*, with her cargo, being *Danish* property, had been under the authority of the law of nations and of war, and agreeably to existing treaties, stopped and detained by the commander of one of his Majesty's ships, and by him sent towards the port of *Mole S. Nicholas*, for the purpose of being legally examined, under the command of Barrett, a midshipman, and two seamen; and that on the near approach to the port, the master, supercargo, and crew of the said ship *had, in [*746] direct violation and breach of their neutrality as *Danish* subjects, and contrary to the law of nations and the faith of treaties, forcibly rescued and taken and kept possession thereof till again captured by a *French* privateer, and she was again captured by one of his Majesty's ships; and the said neutral ship and cargo were, therefore, adjudged good prize.

The Court was of opinion that the sentence of the Court of Admiralty was conclusive that this vessel had so conducted herself as to forfeit her neutrality, by acting in violation of that neutrality, and contrary to the law of nations and faith of treaties. That as to the question concerning the right of searching neutrals, it was said by the Court that before the late armed neutrality, it was considered in this country, and so decided in may cases, that the right of searching neutrals was part of the law of nations; and that such right was supposed to be founded on reason. Judgment was given for the defendant.

The Court, however, in the above case, said, they did not mean to overturn the case of *Saloucci* v. *Johnson*, for in that case the Court of Admiralty had not adjudged, as in the present case, that the ship had forfeited her neutrality. But the general point there mentioned, that a neutral ship need not submit to be searched, cannot be supported; for it is laid down in *Vattel*, (*a*) that this right clearly exists, without which the commerce of contraband goods could not be prevented.

Bynkershoek also mentions, as a thing undisputed, the right of stopping a neutral vessel, in order that it may appear, not from the flag, which may be fraudulently assumed, but from the ship's papers, whether the vessel be really neutral. (*b*)

Valin says, that the refusal to shorten sail and submit to be searched, on the part of a merchant vessel, when summoned by a man-of-war, renders the vessel liable to confiscation. (*c*)

*And *De Martens* says that a merchant vessel must submit to [*747] visitation from a commissioned vessel in time of war, under penalty of confiscation. (*a*)

Besides which, in a late case in the Court of Admiralty, (*b*) Sir *William Scott* thus states the law: "That the right of visiting and searching merchant

---

(*c*) B. R. Hil. 25 Geo. 3, Park Ins. 757, *ante*, pp. 307, 707.
(*d*) 8 T. R. 230.
(*b*) Quæs. Jur. Pub. lib. 1, c. xiv.
(*a*) Vatal, b. 3, c. 7, s. 114.
(*c*) Ordonn. de la Mar. lib. iii. tit. ix. art. xii.

(*a*) Précis, liv. viii. c. vii. § 321. And see this subject treated of at length and a reference made to the treaties between Great Britain and other states during the war, and also to the collision which took place between this country and America, as to the question of the right to search ships of war in the year 1806, in the Commentaries on the Law of Nations, by Mr. Manning. Chap. XI.

(*b*) The Maria, Paulsen, Master, decided the 11th June, 1799. 1 Rob. A. R. 365.

ships upon the high seas, whatever be the ships, whatever be the cargoes, whatever be the destinations, is an incontestible right of the lawfully commissioned cruizers of a belligerent nation; because, till they are visited and searched, it does not appear what the ship, or the cargoes, or the destinations are; and it is for this purpose of ascertaining those points, that the necessity of this right of visitation and search exists. This right is so clear in principle, that no man can deny it who admits the legality of maritime capture; because, if you are not at liberty to ascertain by sufficient inquiry whether there is property that can legally be captured, it is impossible to capture. Even those who contend for the inadmissible rule, that free ships make free goods, must admit the exercise of this right, at least, for the purpose of ascertaining whether the ships are free ships or not. The right is equally clear in practice, for the practice is uniform and universal upon the subject. The many *European* treaties which refer to this right, refer to it as pre-existing, and merely regulate the exercise of it. All writers upon the law of nations unanimously acknowledge it, without the exception even of *Hubner* himself, the great champion of neutral privileges. In short, no man in the least degree conversant in subjects of this kind has ever, that I know of, breathed a doubt upon it. The right must, unquestionably, be exercised with as little of personal harshness and of vexation *in the mode as possible; but soften it as much as you can it is still a right of force, though of lawful force, something in the nature of civil process, where force is employed, but a lawful force, which cannot lawfully be resisted." In another place this very learned person adds, "The penalty for the violent contravention of this right is the confiscation of the property so withheld from visitation and search."

[*748]

And the same law prevails in *America: Kent*, in his Commentaries says:— "The duty of self-preservation gives to belligerent nations this right. The doctrine of the *English* Admiralty on the right of visitation and search, and of the limitation of the right, has been recognized in its fullest extent by the Courts of Justice in this country." (*a*)

The provisions of the celebrated *Consolato del Mare*, on the subject of prize law, deserve to be noticed in this place. The great antiquity of that body of maritime laws, combined with its still existing authority, renders it well worthy of attention: and that part which relates to the subject of prize law has a particular claim on our notice, as the equitable regulations applying to it have been acknowledged and recognized for many centuries by all the maritime states of *Europe*, and are, with some relaxation of their severity, still agreeable to the maritime code and the law of nations of that continent. In the part in question it is said,—"If an armed ship or cruiser meet with a merchant vessel belonging to an enemy, and carrying a cargo the property of an enemy, common sense will sufficiently point out what is to be done; it is, therefore, unnecessary to lay down any rules for such a case." (*b*)

"If the captured vessel is neutral property, and the cargo the property of enemies, the captor may compel the merchant vessel to carry the enemy's cargo to a place of safety, where the prize may be secure from all danger of recapture, paying the vessel the whole freight which she would have earned at her delivering port; and this freight shall be ascertained from *the ship's papers; or, in default of necessary documents, the oath of the master shall be received as to the amount of freight." (*c*)

[*749]

"Moreover, if the captor is in a place of safety where he may be secure of his prize, yet is desirous to have the cargo carried to some other port, the neutral vessel is bound to carry it thither; but for this service there ought to be a

---

(*a*) 1 Rob. A. R. 153, 154, 155. (*b*) Chap. cclxxiii. s. 1.
(*c*) Sect. s. 2.

compensation agreed upon between them, or, in default of any special agreement, the merchant vessel shall receive for that service the ordinary freight that any other vessel would have earned for such a voyage, or even more; and this is to be understood of a ship that has arrived in the place where the captor has secured his prize, that is to say, in the port of a friend, and going on an ulterior voyage to that port to which the captor wishes her to carry the cargo which he has taken." (*b*)

"If it shall happen that the master of the captured vessel, or any of the crew, shall claim any part of the cargo as their own, they ought not to be believed on their simple word; but the ship's papers and invoices shall be inspected; and in default of such papers, the master and his mariners shall be put on their oaths; and, if on their oaths, they claim the property as their own, the captor shall restore it to them, regard being paid at the same time to the credit of those who swear and make the claim." (*c*)

"If the master of the captured vessel shall refuse to carry the cargo, being enemy's property, to some such place of safety, at the command of the captor, the captor may sink the vessel if he thinks fit, without control from any power or authority whatever, taking care to preserve the lives of those who are in her. This must be understood, however of a case where the whole cargo, or at least the greater part, is enemy's property." (*d*)

If the ship should belong to the enemy, the cargo being *either in the whole or in part, neutral property; some reasonable agreement should be entered into on account of the ship, now become lawful prize, between the captor and the merchant owning the cargo." (*a*) [*750]

"If the merchants refuse to enter into such an agreement, the captor may send the vessel home to the country whose commission he bears; and, in that case, the merchants shall pay the freight which they were to have paid at the delivering port: and if any damage is occasioned by this proceeding, the captor is not bound to make compensation, because the merchant had refused to treat respecting the ship after it had become lawful prize; and for this reason also, that the ship is frequently of more value than the cargo she carries. (*b*)

"If, on the other hand, the merchants are willing to a reasonable agreement, and the captor, from arrogance, or other wrong motives, refuses to agree, and forcibly sends the cargo away, the merchants are not bound to pay the whole, nor any part of the freight; and besides the captor shall make compensation for any damage he may occasion to them." (*c*)

"If the capture should be made in a place where the merchants have it not in their power to make good their agreement, but are, nevertheless, men of repute and worthy to be trusted, the captor shall not send away the vessel without being liable for damage; but if the merchants are not men of known credit, and cannot make good their stipulated payment, he may then act as above directed." (*d*)

(*b*) Sect. 3.
(*d*) Sect. 5.
(*b*) Sect. 7.
(*d*) Sect. 9.
(*c*) Sect. 4.
(*a*) Sect. 6.
(*c*) Sect. 8.

SECTION IV.

OF RETURN OF PREMIUM.

HAVING in the three preceding Sections treated of the several causes which
[*751] we recollect rendered the contract *between the assured and the underwriter in some instances void at the commencement of the voyage, and in others where the contract was voided by some act of the assured as a breach or non-compliance with some warranties, we come now to consider an important branch of the subject of marine insurances, namely, the question in what cases by the law of this country there shall be a return of premium made by the underwriters to the assured?

I may, before entering on this subject, refer the reader back to Section 1, of the Second Part of this Treatise (*a*) where the subject of the return of premium in the case of fraud, in the Courts of this country, as well as by some foreign ordinances was fully discussed. Dismissing, therefore that part of the subject, I shall begin to mention in what other cases it is settled that there is to be a return of premium.

1. The first rule which is to be mentioned is that where the property has been insured to a larger amount than the real value, the underwriter shall return the overplus premium, or if it happen that goods are insured to come in certain ships from abroad, but are not in fact shipped, the premium shall be returned. And this principle which is founded in reason and good sense is exercised in all countries where insurances are known and is said to be coeval with the contract itself, (*b*) *Magens* writes that, "If the ship be arrived after the policy is made, and the underwriter is acquainted with the arrival, though the assured is not, the latter will be entitled to have his premium restored on the ground of fraud. But if both parties are ignorant of the arrival, and the policy is "lost or not lost," I think in that case the underwriter should retain; because under such a policy, if the ship had been lost at the time of subscribing, he would have been liable to pay the amount of his subscription. (*c*)

Accordingly in the case of *Martin* v. *Sitwell*, (*d*) which was an action of
[*752] *indebitatus assumpsit*, brought by the plaintiff *for 5*l.* received by the defendant to the plaintiff's use, where the general issue was pleaded, it appeared in evidence, that one Barkdale had made a policy of insurance upon account for 5*l.* premium in the plaintiff's name, and that he had paid the said premium to the defendant, and that Barkdale had no goods then on board, and so the policy was void. To this action two objections were taken: 1st, That it should have been brought in Barkdale's name, which was overruled. 2ndly, That this ought to have been a special action on the custom of merchants. Lord Chief Justice *Holt* cited a case of money deposited upon a wager concerning a race, that the party winning might bring an action of *indebitatus assumpsit* for money received to his use, for now by the subsequent matter it is become as such. And as to the case in question, the money is not only to be returned by the custom, but the policy is made originally void, the party for whose use it was made having no goods on board; so that by this discovery the money was received without any reason, occasion, or considera-

(*a*) Page 625.
(*b*) Loccenius de Jure Marit. 1. 2, c. 5, s. 8. See Park Ins. 766.
(*c*) 1 Mag. 90. See the case of Mead v. Davison, *ante*, p. 11.
(*d*) 1 Show. 156.

tion, and consequently it was received originally to the plaintiff's use. And so judgment was given for the plaintiff.

The parties themselves frequently insert clauses stating, that upon the happening of a certain event, there shall be a return of part of the premium, as in the case of *Wedderburn and others* v. *Bell*, (*a*) which was an insurance on goods on board the *Minorca* at and from *Jamaica* to *London*, at a premium of ten guineas per cent., to return 5*l.* per cent. if the ship sailed from the place of rendezvous with convoy for the voyage, and arrived. So in the case of *Simond* v. *Boydell*. (*b*)

This action was brought against an underwriter for a return of premium. The material part of the policy was in these words: "At and from any port or ports in *Grenada* to *London*, on any ship or ships that shall sail on or between the 1st of *May* and the 1st of *August*, 1778, at 18 guineas per cent., *to return 8*l.* per cent. if she sails from any of the *West India Islands* with convoy for the voyage, and arrives." At the bottom [*753] there was a written declaration that the policy was on sugars (the muscovado valued at 20*l.* per hogshead) for account of L. Q., being on the first sugars which shall be shipped for that account. The ship *The Hankey* sailed with convoy within the time limited, having on board fifty-one hogsheads of muscovado sugar, belonging to L. Q. She arrived safe in the *Downs*, where the convoy left her; convoy never coming further, and indeed seldom beyond *Portsmouth*. After she had parted with the convoy, she struck on a bank called the *Pan Sand*, at *Margate*, and eleven of the fifty-one casks of sugar were washed overboard, and the rest damaged. The ship was afterwards got off the bank, and proceeded up the river, arrived safe in the port of *London*, and was reported at the Custom-house. The sugars saved were taken out at *Margate*, and, after undergoing a sort of cure, by a person sent from town for that purpose, they were carried to *London* in other vessels; and the forty hogsheads being sold, produced 340*l.* instead of 800*l.*, which was their valuation in the policy. The defendant had paid into Court the value of the sugars lost, and a return of eight per cent. on 340*l.* The plaintiffs insisted that they were entitled to have 8*l.* per cent. also returned on the valued price of the eleven hogsheads of sugar which were lost, and on the difference between what the remaining forty hogsheads produced, and their valued price. At the trial before Lord *Mansfield*, the plaintiffs had a verdict to the full amount of their demand. The chief question upon the motion for a new trial was, to what the word "arrives" was intended to apply?

Lord *Mansfield*.—"The ancient form of a policy of insurance, which is still retained, is, in itself, very inaccurate; but length of time, and a variety of discussions and decisions, have reduced it to certainty. It is amazing, when additional clauses are introduced, that the merchants do not take some advice in framing them, or bestow more consideration upon them themselves. I do not recollect an addition made, *which has not created doubts on the construction of it. Here a word or two more would have rendered [*754] the whole perfectly clear. However, I have no doubt how we must construe this policy. Dangers of the sea are the same in time of peace and of war; but war introduces hazards of another sort, depending on a variety of circumstances, some known, others not, for which an additional premium must be paid. Those hazards are diminished by the protection of convoy, and if the insured will warrant a departure with convoy, there is a diminution of the additional premium. If the insured will not warrant a departure with convoy, he pays the full premium, and in that case the underwriter says, 'If it turn

(*a*) 1 Camp. 1. (*b*) 1 Doug. 268.

out that the ship departs with convoy, I will return part of the premium.' But a ship may sail with convoy, and be separated from it by a storm, or other accident, in a day or two, and lose its protection. On a warranty to sail with convoy, that would not be a breach of the condition; but to guard against that risk, the insured adds, in policies of the present sort, 'the ship must not only sail with convoy, but she must arrive to entitle me to the return.' The words 'and arrives' do not mean that the ship shall arrive in the company of the convoy, but only that she herself shall arrive. If she does, that shews either that she had convoy the whole way, or did not want it. But, in the stipulation for the return of premium, no regard is had by the parties to the condition of the goods on the arrival of the ship. The construction contended for by the defendant, is adding a comment longer than the text. If it had been meant that no return should be made, unless all the goods arrived safe, they would have said, 'if the ship arrive with all the goods,' or 'safely with all the goods.' The total or average loss of the goods was the subject of the indemnity, and must be paid for by the underwriter. But as to the return of the additional premium, whether the goods arrive safe or not, makes no part of the question. The single principle which must govern is, that in the events which have happened, the war risk has been rated too high."

[*755] *The rule for a new trial was accordingly discharged.

So also in a later case of *Aguilar and others* v. *Rodgers*, (*a*) where, in a policy on freight, this clause was found, "to return 10*l.* per cent. if the ship sailed with convoy and arrived;" it was contended at the Bar, that although the ship sailed with convoy, and although she arrived at her port of destination, yet as she had been captured and recaptured during the voyage, and had paid salvage to the recaptors, the plaintiffs (the assured) were not entitled to a return of premium within the true construction of the above clause.

Lord *Kenyon* delivered the unanimous opinion of the Court: "I agree with the counsel for the defendant, that every arrival of the ship at her port of destination would not be an arrival within the fair construction of this memorandum; such, for instance, as an arrival in the possession of an enemy at a neutral port, or an arrival at her port in *England* as the property of other persons after a capture. But in order to satisfy the meaning of the memorandum, it should be an arrival at her destined port in the course of her voyage. It is now too late to controvert the authority of *Hamilton* v. *Mendez*, even if we were disposed to do so, which I am not, where it was holden that though the assured may abandon, on hearing of a capture, yet if they do not abandon, and the ship be afterwards recaptured, it must be considered as if she had never been out of the possession of the owners. It is eighteen years since the case of *Simond* v. *Boydell* was decided; that case must be well known in the commercial world; and if the parties in this case had intended to make an agreement different from that which the words used in this memorandum import, they would have added after arrived, 'safely from the enemy,' or some words to that effect. But the words here used are not equivocal, and we ought not to depart from them: it would be attended with great mischief and inconvenience, if in construing contracts of this kind we were not to decide according to

[*756] the words *used by the contracting parties. Suppose this question had arisen on a contract under seal, and an action of covenant had been brought, assigning as a breach the non-arrival of the ship at the port of *London*, the answer that in fact the ship did arrive there in the course of her voyage would have been decisive. And if so, this memorandum must receive the same construction in this action. On the grammatical construction of the

(*a*) 7 T. R. 421.

words, which is the safest rule to go by, I am of opinion that the verdict obtained by the plaintiff ought not to be set aside.

In a case in the Common Pleas, of *Audley* v. *Duff*, (*a*) there was the following clause for a return of premium in a policy "at and from *Oporto* to *Lynn*, with liberty to touch at any ports on the coast of *Portugal* to join convoy, particularly at *Lisbon*, to return 6*l.* per cent. if she sail with convoy from the coast of *Portugal* and arrive." The ship sailed from *Oporto* under the protection of a sloop and cutter appointed to protect the trade of that place to *Lisbon*, from whence it was to sail under a larger convoy to *England*. In the way to *Lisbon*, the fleet was dispersed, and this ship ran for *England* and arrived. It was contended that this ship had not sailed from the coast of *Portugal* with convoy. But the Court held, that having sailed from *Oporto*, with a convoy duly appointed, and with a *bonâ fide* intention to proceed to *England*, though by desire of the admiral, *Lisbon* was to be taken in the way, the condition, on which the return of premium was to be made, had been performed.

If, therefore, an insurance be *bonâ fide* effected by several policies and the interest turned out to be less than the amount insured by the whole, there must be a return of premium upon all the policies, and the underwriters must refund rateably according to their respective subscriptions. This is not the rule of law in *France*, and in many other *countries, for there they look to the priority of the dates of the subscriptions; but if several [*757] policies have the same date they make one policy.

It is, however, to be observed that the above rule applies only to the case of several policies effected before the commencement of the risk, for where an insurance has been effected by one or more policies, and the risk has commenced, and subsequent policies are afterwards signed, if a loss were to happen between the signing of the first and subsequent policies, the underwriters on the first would be liable in proportion to their subscriptions to the extent of the whole sum insured; and therefore the risk having been incurred by them, no claim ought to be made for a return of premium. And, therefore, the Court of Exchequer in a very recent case of *Fisk* v. *Masterman*, (*b*) decided that where an insurance was effected on the 12th *April*, on a cargo of cotton, then at sea, by five several policies, at the rate of fifty guineas per cent.; and on the 13th *April*, news of the vessel's safety having arrived, a further insurance was *bonâ fide* effected by six different policies, at ten and five guineas per cent.; and the latter insurance, added to the former, exceeded in amount the value of the subject-matter insured, but the former, of itself, did not; the assured were entitled to a return of premium on the amount of the over insurance, to which the underwriters who subscribed the policies of the 13th *April* were to contribute rateably in proportion to the sums subscribed by them respectively, the amount of the over insurance having first been ascertained by taking into account all the policies: but that no return of premium was to be made with respect to those policies which had been subscribed on the 12th.

Lord *Mansfield*, in the case of *Tyrie* v. *Fletcher*, (*c*) which had been tried before his Lordship at *Guildhall*, and now came to be argued in the Court of King's Bench, Michaelmas Term, 1777, laid down the law respecting the return of premium in two kinds of cases. First, where the risk had not been *run at all; secondly, where the risk has once commenced. Lord *Mansfield* said,—"It was very proper to save this case for the [*758]

(*a*) 2 Bos. & Pull. 111. So where the words were, "If she depart from Portugal and arrive." Everard v. Hollingworth, 2 Bos. & Pull. 111, in the note. See Kellner v. Le Mesurier, 4 East, 396.

(*b*) 8 M. & W. 165.

(*c*) Cowp. 666.

opinion of the Court; because, in all mercantile transactions, certainty is of much more consequence than which way the point is decided: and more especially so in the case of policies of insurance; because, if the parties do not choose to contract according to the established rule, they are at liberty between themselves to vary it. This case is stripped of every authority. There is no case or practice in point, and, therefore, we must argue from the general principles applicable to all policies of insurance. And, I take it, there are two general rules established applicable to this question. The first is, that where the risk has not been run, whether owing to the fault, pleasure, or will of the assured, or to any other cause, the premium shall be returned; because a policy is a contract of indemnity. The underwriter receives a premium for running the risk of indemnifying the assured, and, whatever cause it be owing to, if he does not run the risk, the consideration for which the premium or money was put into his hands fails, and therefore he ought to return it.

"Secondly, another rule is, that if the risk of the contract of indemnity has once commenced, there shall be no apportionment or return afterwards. For though the premium is estimated, and the risk upon the nature and length of the voyage, yet though it be only for twenty-four hours, or less, the risk is run: the contract is for the whole entire risk, and no part of the consideration shall be returned; and yet it is as easy to apportion for the length of the voyage as it is for the time. If a ship had been insured to the *East Indies*, agreeably to the terms of the policy in this case, and had been taken, twenty-four hours after the risk was begun, by an *American* captor, there is not a colour to say that there should have been a return of premium. So much, then, is clear, and perfectly agreeable to the ground of determination of *Stevenson* v. *Snow*, (*d*)

[*759] For in that case the intention of *the parties, the nature of the contract, and the consequences of it, spoke two insurances and a division between them. The first object of the insurance was from *London* to *Halifax;* but if the ship did not depart from *Portsmouth* with convoy, (particularly naming the ship appointed to be convoy) then there was to be no contract from *London* to *Halifax*. Why, then, the parties have said, 'We make a contract from *London* to *Halifax*, but, on a certain contingency, it shall only be a contract from *London* to *Portsmouth:*' that contingency not happening, reduced it, in fact, to a contract from *London* to *Portsmouth* only. The whole argument turned upon that distinction. Let us see, then, what the agreement of the parties is in the present case. They might have insured from two months to two months, if they thought proper so to do, but the fact is they have made no division of time at all; but the contract entered into is one entire contract from the 19th *August*, 1776, to the 19th *August*, 1777, which is the same as if it had been said by the assured, 'If you, the underwriter, will insure me for twelve months, I will give you an entire sum; but I will not have any apportionment.' The ship sails, and the underwriter runs the risk for two months. No part of the premium shall be returned. I cannot say if there had been a recapture within the twelve months that the policy would not have revived."

Aston, *Willes*, and *Ashurst*, Justices, were of the same opinion; and a nonsuit was entered. (*a*)

In the case of *Oom and others* v. *Bruce*, (*b*) where an insurance had been made on goods "at and from a port in *Russia* to *London*," by an agent resid-

---

(*d*) 3 Burr. 1237.

(*a*) In this case the ship was warranted "free of American capture and seizure." She was taken in about two months after she sailed by an American privateer.

(*b*) 12 East, 225.

ing here, for a *Russian* subject abroad, which insurance was, in fact, made after the commencement of hostilities by *Russia* against this country, but before the knowledge of it here, and after the ship had sailed, and had been seized and confiscated: it was held that the policy was void in its inception; but Lord *Ellenborough*, *C. J., considered that the plaintiffs were entitled to recover back the premium, as money had and received [*760] by the defendants to their use without consideration, and having made the insurance without any consciousness of its illegality at the time; and the plaintiff accordingly recovered for the amount. A motion was afterwards made to set the verdict aside, and to enter a nonsuit.

Lord *Ellenborough*, C. J., said.—"Without doubt, if the party making the insurance know it to be illegal at the time he could recover; but here the plaintiffs had no knowledge of the commencement of hostilities by *Russia* when they made the insurance, and therefore no fault is imputable to them for entering into the contract: they could never have derived any benefit."

Le Blanc, J.—"The period to look to, as to the legality of the contract, is the time when it was made; and then the subjects of *Russia* had become enemies of this country, and it was no longer competent to the subjects of this country to enter into such a contract. But no blame attaches to the plaintiffs, who were ignorant of the fact at the time, and therefore they are entitled to a return of premium.

In the case of *Furtado* v. *Rogers*, (*a*) which was fully treated in a previous part of this Treatise. (*b*) Lord *Alvanley*, who delivered the judgment, says at the close of it, "The plaintiff is not entitled to a return of premium because the contract was legal at the time the risk commenced, and was a good insurance against all other losses, but that arising from capture by the forces of *Great Britain*."

In *Henry and others* v. *Staniforth*, (*c*) which was an action on a policy of insurance "at and from *Riga* to *Great Britain*:" with a count for money had and received.

Two questions arose at the trial before Lord *Ellenborough*, C. J., Mich. Term, 56 Geo. 3.

1st. Whether the voyage was properly legalized, this country having been then at war with *Russia?*

*2nd. Whether the premium could be recovered back?

Lord *Ellenborough*.—"I think it is impossible to say that this [*761] adventure which commenced on the 10th *September*, was legalized by a license dated the 7th *October*, to remain six months from the date thereof." But I am of opinion that the underwriters have no right to retain the premium. Here no contravention of the law was meditated by any of the parties concerned. If the voyage had been retarded, or the license but a short time, all would have been right. On the 20th of *November*, it was not known in *London* when the ship sailed from *Riga*, and the policy was made under an ignorance of the facts. The risk was believed to be legal. The underwriters have not succeeded to shew that they have committed any crime in receiving the premium, and, therefore, they must restore it to the assured, who have failed in obtaining the indemnity which it was meant to purchase.

Verdict accordingly, confirmed afterwards by the Court of King's Bench.

Also in the case of *Routh* v. *Thompson*, (*a*) which has already been treated of in this Treatise on a different subject. Lord *Ellenborough*, C. J., at the conclusion of his judgment, says, "The question then arises, whether the

---

(*a*) 3 B. & P. 191.
(*b*) *Ante*, p. 655.
(*c*) 4 Camp. 269.
(*a*) 11 East, 428, *ante*, p. 57.

plaintiff has any right to recover back the premium? and as there was no fraud in the captors in making the insurance; as there was no illegality in the voyage or insurance; and as the resistance of the underwriters to the claim upon the policy proceeds on the ground that there was no risk, the plaintiff is entitled to his premium, and the verdict be entered accordingly."

In the case of *Lowry and others* v. *Bourdieu*, (*b*) which has been stated fully at a previous part of this Treatise, (*c*) to which the reader is referred to for Lord *Mansfield's* judgment, and where the insurance was on the captain's bond to the plaintiff, which was held to be a wagering policy, and void by the act 19 Geo. 2; it was likewise held that the risk having been run the assured could not recover back the premium.

[*762] *In the case of *Hastelow* v. *Jackson*, (*a*) Judge *Littledale* says, "If two parties enter into an illegal contract, and money is paid upon it by one to the other, that money may be recovered back before the execution of the contract but not afterwards."

The Court, in the case of *Lowry* v. *Bourdieu*, proceeded upon the distinction between contracts executed and executory, although it must be confessed, that the case about to be quoted, which was only decided suddenly at *nisi prius*, is a good deal shaken by the subsequent decision of *Andree* v. *Fletcher*. (*b*)

It was an action in the case of *Wharton* v. *De la Rive*, (*c*) brought upon two wagers; one of 26*l.* 5*s.* to 100*l.*, and the other to 13*l.* 2*s.* 6*d.* to 30*l.*, that the colonies of *North America* would be admitted or acknowledged independent states, by some public official act or instrument made or executed, on the part of the King or government of *France*, at some time on or between the 1st of *February* and the 1st of *April*, 1778, both days inclusive. The defendant pleaded *non assumpsit*. Upon the opening of this case, Lord *Mansfield* directed the plaintiff to be nonsuited. But the counsel for the plaintiff insisted, that he was entitled to a verdict for the premium on the general count in the declaration, for money had and received to his use, which his Lordship permitted, on the ground of the contract being void, and of the defendant having money in his hands, which he ought not to retain. For the defendant, it was said, that he was entitled to keep the premium: and the case of *Lowry* v. *Bourdieu* was cited; but Lord *Mansfield* thought it did not apply, as in that case the risk had been run. The point there decided was, that an insurance being made without interest, and the premium paid, the insured shall not recover back the premium after the ship has arrived safe. And this upon the distinction, that the contract, though not a legal one, was executed before the relief was applied for, and no longer executory.

[*763] *In another case of *Mackenzie and others* v. *Duff*, (*a*) the assured, having been nonsuited at the trial, on the ground that the goods insured were prohibited, and that the shipment of them, under the circumstances disclosed, was a violation of the acts of navigation, insisted that they were entitled to a return of premium, and a motion was made to set aside the nonsuit. Had this case proceeded, a decision of the precise question, whether the premium is recoverable in cases of insurance effected contrary to the statute law of the realm, without reference to the distinction between contracts executed and executory, would probably have been obtained; but unfortunately the rule was discharged upon a collateral point, and the main question, therefore, remained undecided.

(*b*) Doug. 468. (*c*) *Ante*, p. 72.

(*a*) 8 B. & C. 227. See Paterson v. Powell, 9 Bing. 320. Roebuck v. Hamerton, Cowp. 737. (*b*) 3 T. R. 266.

(*c*) Mich. Vac. 1782, at Guild. Park Ins. 780.

(*a*) B. R. Hil. Term, 1799. Park Ins. 780.

And in another case of *Vandyck* v. *Hewitt*, (*b*) the Court of King's Bench, after a consideration of all the cases, held, that where a premium had been paid on a policy to cover a trading with the enemy, though the insurance was void and the underwriters not compellable to pay the loss, it could not be recovered back.

Lord *Kenyon*, in giving judgment, observed that it was impossible to distinguish this case from the common one of a smuggling transaction. Where the vendor assists the vendee in running the goods to evade the laws of the country, he cannot recover back the goods themselves, or the value of them. The rule has been settled at all times, that where both parties are in *pari delicto*, which is the case here, *potior est conditio possidentis*.

In the case of *Morck and another* v. *Abel*, (*c*) a foreigner having made an insurance upon a *Danish* ship at and from *Bengal* (in which province there are some *Danish* settlements) to *Copenhagen*, and the ship having loaded at *Calcutta*, contrary to the Navigation Act of 12 Car. 2, c. 18, s. 1. Lord *Alvanley* and Mr. Justice *Rooke*, and Mr. Justice *Chambre*, *relied upon the cases of *Andree* v. *Fletcher*, and *Vandyck* v. *Hewitt*, (*a*) [*764] and laid down the principle of their decision against the assured's right to recover the premium, as extracted from all the cases, to be, that no man can come into a *British* Court of Justice to seek the assistance of the law, when he founds his claim upon a contravention of the *British* laws. And a distinction having been attempted at the Bar, on the ground of the party interested being a foreigner, it was answered, that that could make no difference, as the Navigation Laws were particularly aimed against foreigners; and that we ought not to relax the rigour of our great political regulations in favour of foreigners offending against them.

So again in the case *Lubbock* v. *Potts*, (*b*) where an insurance on colonial produce from the *British West Indies* to *Gibraltar* was holden to be void, as a violation of the acts of navigation, the Court of King's Bench, consisting of Lord *Ellenborough*, and Judges *Grose*, *Lawrence*, and *Le Blanc*, relying on all the above cases, which were quoted from the Bar, decided that the premium could not be recovered.

But where the policy is void, merely because the insurance is made upon a subject-matter, not insurable, as for instance, upon money advanced to the captain abroad, the assured may recover the premium, *Siffken* v. *Allnutt*. (*c*)

So in a case of *Hunter* v. *Wright*, (*d*) which was an insurance on a ship for a year, in which the underwriter stipulated to return a part of the premium, "if sold or laid up, for every uncommenced month." Lord *Tenterden* held, that where the vessel had been laid up for several months within the year, but was employed again within the year, that was not such a laying up as to entitle the assured to a return of premium.

*In another case of *Loraine* v. *Thomlinson*, (*a*) the Court of King's Bench adopted the same rule of decision, where the ship [*765] was insured for twelve months, and the risk ceased at the end of two. A distinction was attempted to be made, because in this case, the whole premium 18*l.* was acknowledged to be received from the insured at the rate of fifteen

(*b*) 1 East, 96. See Potts v. Bell, *ante*, p. 644.
(*c*) 3 B. & P. 35. (*a*) *Ante*, p. 763.
(*b*) 7 East, 449. *Ante*, p. 659.
(*c*) 1 M. & S. 39. In the case of Hogg v. Horner, *ante*, p. 241, Lord Kenyon being of opinion that there was a deviation, it was insisted that the assured had a right to return of premium; but Lord Kenyon thought there was an inception of the risk "at," and the contract being entire, there could be no return of premium.
(*d*) 10 B. & C. 714. (*a*) Doug. 585.

shillings per month: and this it was insisted, evidently shewed the parties intended the risk to continue only from month to month. This objection was, however overruled: the Court being of opinion, that the case of *Tyrie* v. *Fletcher* (*b*) decided this; and that the 15*s.* per month was only a mode of computing the gross sum. The case was in substance as follows:

It was an action tried before Lord *Loughborough*, at the assizes for the county of *Northumberland*, in which the plaintiff declared,—That the defendant, in consideration that the plaintiff at his request had underwriten several policies of insurance as to certain sums of money therein subscribed against his name, on the ships, merchandises, and other things therein respectively specified, without receiving the full premiums therein mentioned, undertook and promised to pay the plaintiff so much money, as the premiums therein mentioned to be paid to him amounted to, with an averment that they amounted to 40*l.* There was another count for 40*l.* for money had and received by the defendant to the plaintiff's use. The defendant pleaded *non assumpsit* as to all, except the sum of 3*l.*, upon which plea issue was joined; and as to the 3*l.*, he pleaded a tender, and paid that sum into Court. Upon the plea of tender, issue also was joined. The jury found a verdict for the defendant upon the tender, and for the plaintiff upon the other issue, for the sum of 15*l.* subject to the opinion of the Court, whether he was entitled to recover that sum of 15*l.* or the sum of 3*l.* only, upon a case which stated in effect, as follows: The plaintiff had underwritten 200*l.* on a policy effected at *Newcastle*, (which [*766] was set forth *verbatim* in the case) whereby the ship the *Chollford* was *insured against capture by the enemy for twelve months, in the coasting trade between *Leith* and the *Isle of Wight;* beginning the 13th of *March*, 1779, and ending the 13th of the same month, 1780. In the body of the policy it was stated, "That the assurers confessed themselves paid the consideration due unto them by the assured, at and after the rate of 15*s.* per cent. per month. At the bottom, opposite to the plaintiff's subscription, was written, "Premium received 16th of *March*, 1779;" and on the back was indorsed, "*Newcastle*, 15th of *March*, 1779. Mr. *John Gaul Thomlinson*, on his ship the *Chollford*, himself master, for twelve months, in the coasting trade, at and between *Leith* and the *Isle of Wight*, beginning the 13th of *March*, 1779, and ending the 12th of *March*, 1780. Enemy only. At 15*s.* per cent. per month, 18*l.*" The premium was not paid, though expressed in the policy to have been paid, it being the usage in *Newcastle* not to pay the premium at the time of making the insurance: but at various times after the policies are effected, and sometimes, not till twelve months after. The ship was lost in a storm, within the first two of the twelve months for which the insurance was made, and the defendant tendered to the plaintiff 3*l.* as the premium for two months. The case then states contradictory evidence given by witnesses on both sides, as to what had been done at *Newcastle* in similar cases: but which I forbear to set down; because the Court of King's Bench was afterwards of opinion, that it ought not to have been received.

After the counsel for the defendant had been heard, the plaintiff's counsel was prevented by the Court from proceeding.

Lord *Mansfield*.—"This is a mere question of construction on the face of the instrument, and therefore parol evidence should not have been admitted to explain it. It is an insurance for twelve months, for one gross sum of 18*l.* They have calculated this sum to be at the rate of 15*s.* per month. But what [*767] was to be paid down? Not 15*s.* for the first month, and so from month to month; but 18*l.* at once. *Two cases have been men-

(*b*) *Ante*, p. 757.

tioned. *Stevenson* v. *Snow* was decided on the ground of there being two voyages. *Tyrie* v. *Fletcher* is directly in point against the defendant. (*a*) There are two principles in these cases—1st, If the risk has never begun, the whole premium is to be returned, because there was no consideration; 2ndly, When the risk has begun there shall never be a return, although the ship should be taken in twenty-four hours."

The rest of the Court concurred, and the *postea* was delivered to the plaintiff.

A rule had been obtained to show cause why there should not be a new trial in a case, which had come on before Lord *Mansfield* at *Guildhall*, when the jury found a verdict for the defendant, *Bermon* v. *Woodbridge*. (*b*) The case was this: It was an action on a policy of insurance, on the *French* ship *Le Pactole*, and her cargo, and the voyage was described in the policy in the following words: "At and from *Honfleur* to the coast of *Angola*, during her stay and trade there, at and from thence to her port or ports of discharge in *St. Domingo*, and at and from *St. Domingo* back to *Honfleur*." The clause respecting the premium was as follows: "Slaves valued at eight hundred livres Tournois per head; the ship at 1,450*l.* sterling; other goods, &c., as interest may appear, at a premium of eleven per cent." The ship sailed to *Angola*, and from thence, after staying some time there, to the *West Indies*. On her way to *Angola* she put in at *Cayenne*, on the coast of *America*, and from *Cayenne* went to *Martinico*, confessedly out of the way to *St. Domingo*. In this cause the first question was a question of fact, not material to our present inquiry, viz: Whether the course taken was a deviation, or not, from the voyage insured? After all the evidence had been heard, the jury thought it was, and accordingly found a verdict for the defendant. Upon their declaring this opinion, the counsel for the plaintiff insisted, that as there was a count in the declaration for money had and received, *the voyage insured ought to be considered as composed of three distinct parts of voyages, [*768] namely, from *Honfleur* to *Angola;* 2ndly, from *Angola* to *St. Domingo;* and 3rdly, from *St. Domingo* to *Honfleur;* and that, as the voyage from *St. Domingo* to *Honfleur* had never commenced, the premium ought to be apportioned, and a return made of that part which was paid to insure the risk from *St. Domingo* to *Honfleur*. Lord *Mansfield* took the opinion of the jury upon that point also; and they were clear there ought to be no return. Next day, however, his Lordship said, he had turned that question in his mind, and that he entertained some doubts upon it, and as it was a question of law, desired Mr. *Lee* to move a new trial on that ground. It was, however, afterwards moved on both grounds, namely, On the question of fact, whether the deviation was wilful? and 2ndly, On the question of law, whether, supposing it wilful, there ought to be a return of premium?—These questions were fully discussed by three advocates on each side; and the Court also took time to deliberate upon them; after which the Lord Chief Justice delivered the unanimous opinion of the whole Court.

Lord *Mansfield*, after stating that upon the question of fact, they were perfectly satisfied with the verdict of the jury, proceeded thus: "If, however, the plaintiff should succeed on the second point, the determination would virtually allow him a new trial on the whole of the cause, because no special case was reserved. But, on the fullest consideration, and after looking into all the cases (though my opinion has fluctuated,) we are now all clearly of opinion, that there ought not to be any return. The question depends upon this: Whether the policy contains one entire risk on one voyage, or whether it is to be split into six different risks? for, by splitting the words, and taking "at" and "from"

(*a*) *Ante*, p. 757. (*b*) Doug. 781.

separately it will make six, viz: 1st, *At Honfleur;* 2d, *From Honfleur* to *Angola;* 3d, *At Angola*, &c. The principles are clear. Where the risk has never begun, there must be a return of premium; and if the voyages, in this [*769] case, are distinct, the *risk from *St. Domingo* to *Honfleur* never began. On the other hand, if the risk has once begun, you cannot sever it, and apportion the premium. In an insurance upon a life, with the common exceptions of suicide, and the hands of justice, if the party commit suicide, or is executed in twenty-four hours, there shall be no return. The case is the same if a voyage insured is once begun. Is this one entire risk? The insured and insurers consider the premium as an entire sum for the whole, without division: it is estimated on the whole at 11*l.* per cent. And, which is extremely material, there is no where any contingency, at any period, out or home, mentioned in the policy, which happening or not happening, is to put an end to the insurance. The argument must be, that, if the ship had been taken between *Honfleur* and *Angola*, there must have been a return. By an implied warranty, every ship must be seaworthy when she first sails on the voyage insured, but she need not continue so throughout the voyage; so that, if this is one entire voyage, if the ship was seaworthy when she left *Honfleur*, the underwriters would have been liable, though she had not been so at *Angola*, &c.; but according to the construction contended for on behalf of the plaintiff, she must have been seaworthy, not only at her departure from *Honfleur*, but also when she sailed from *Angola*, and when she sailed from *St. Domingo*. The cases of *Stevenson* v. *Snow*, (*d*) and *Bond* v. *Nutt*, (*e*) were quite different from this. They depended upon this, that there was a contingency specified in the policy, upon the not happening of which the insurance would cease. In *Stevenson* v. *Snow*, it depended on the contingency of the ship sailing with convoy from *Portsmouth*, whether there should be an insurance from that place. This necessarily divided the risk, and made two voyages. In *Bond* v. *Nutt*, it was held, that there were two risks, upon the same principle. "At *Jamaica*," was one; the other, viz: the risk "from *Jamaica*," depended on [*770] the contingency of the ship having sailed on or *before the 1st of *August*: that was a condition precedent to the insurance on the voyage from *Jamaica* to *London*. The two cases of *Tyrie* v. *Fletcher*, (*a*) and *Loraine* v. *Thomlinson*, (*b*) are very strong, for, if you could apportion the premium in any case, it would be in insurances upon time. Therefore, on very full consideration, we think this one entire risk, one voyage, and that there can be no return of premium." The rule was discharged.

In the case of *Meyer* v. *Gregson*, (*c*) which was an action for return of premium, tried before Mr. Justice *Willes*, on the Northern Circuit, where a verdict had been given for the plaintiff, upon a motion to set aside the verdict, and to enter a nonsuit, a decision, similar to that of *Bermon* v. *Woodbridge* was made. The insurance was "at and from *Jamaica* to *Liverpool*, warranted to sail on or before the 1st of *August*, premium twenty guineas per cent. to return eight, if she sailed with convoy." The ship did not sail till *September*, and was lost. The jury apportioned the premium, and gave the plaintiff a verdict for eight guineas, the defendant having paid eight for the convoy into Court, which was allowing four for the risk run by the defendant at *Jamaica*.

Lord *Mansfield*.—"It would be endless to go into inquiries about the risk at *Jamaica*. It appears on the evidence to be different on different sides of the island. Besides the parties have divided the risk, with respect to convoy; for

---

(*d*) *Ante*, p. 759.
(*a*) *Ante*, p. 757.
(*c*) B. R. Easter T. 24 Geo. 3. Park Ins. 795.
(*e*) *Ante*, p. 672.
(*b*) *Ante*, p. 765.

it is a premium of twenty guineas to return eight, if she sail with convoy: but there is an absolute warranty as to the sailing, and nothing said of the premium."

Mr. Justice *Willes* thought the premium should be apportioned.

Mr. Justice *Ashurst* and Mr. Justice *Buller* agreed with Lord *Mansfield*, the latter observing, that as the parties have not considered it as two risks, nor estimated the risk at *Jamaica*, the Court cannot do it for them. In all the *insurances from *Jamaica*, the policy runs "at and from," and [*771] though in many instances, the voyage has not begun, yet there never was an idea of the premium being returned, and that no usage was found by the jury. The rule for entering the judgment of nonsuit was made absolute.

In another case of *Gale* v. *Machell*, (*a*) upon an insurance "at and from any port or ports in *Jamaica* to *London*, following and commencing on her first arrival there, warranted to sail with convoy from the place of rendezvous to *Great Britain*," the same questions were again agitated. But as the counsel differed upon the evidence given at the trial, the main question was not fully discussed by the Court, but was sent back to a new trial.

And in the case of *Long* v. *Allen*, (*b*) which was an action for a return of the premium. The policy was "at and from *Jamaica* to *London*, warranted to depart with convoy for the voyage, and to sail on or before the 1st of *August*, upon goods on board a ship called the *Jamaica*, at a premium of twelve guineas per cent." The ship sailed from *Jamaica* to *London* on the 31st *July*, 1782, but without any convoy for the voyage. At the trial before Lord *Mansfield*, the jury found a verdict for the plaintiff, subject to the opinion of the Court upon a case stating the facts already mentioned. In addition to which they expressly find, that it is "the constant and invariable usage in an insurance at and from *Jamaica* to *London*, warranted to depart with convoy, or to sail on or before the 1st of *August*, when the ship does not depart with convoy, or sails after the 1st of *August*, to return the premium, deducting one-half per cent."

Lord *Mansfield*.—"An insurance being on goods warranted to depart with convoy, the ship sails without convoy, and an action is brought to recover the premium. The law is clear, that if the risk be commenced, there shall be no return. Hence questions arise of distinct risks insured by one policy or instrument. My opinion has been to divide the risks. *I am aware [*772] that there are great difficulties in the way of apportionments, and therefore the Court has sometimes leaned against them. But where an express usage is found by the jury, the difficulty is cured. (*c*) They offered to prove the same usage as to the *West Indies* in general, but I stopped them, and confined the evidence to *Jamaica*."

The rest of the Court concurred, and the *postea* was delivered to the plaintiff.

SECTION V.

OF RE-ASSURANCE AND DOUBLE ASSURANCE.

It is necessary, in a Treatise which proposes to treat of the principles of the law of Marine Insurances, not to omit any part of the subject, which is known and acknowledged by the law of England: and I, therefore, proceed

---

(*a*) B. R. East. 25 Geo. 3. Park Ins. 797. (*b*) B. R. East. T. 25 Geo. 3. Id.
(*c*) See Meyer v. Gregson, *ante*, p. 770.

to state the law applicable to this branch, which is the head of this section, of the subject of which I proposed to consider the principles. I must, however remark, in the outset, that though the law upon this subject is well settled and established, it does not appear in the present day, to hold any place among the questions on this subject which constantly are being brought under the consideration of the Courts of Law; and what proves this more strongly, is the fact that there are not, I believe, any recent cases to be found upon the subject. The late Mr. Justice *Park*, whose system of Marine Insurance is the best guide to any one who wishes to have an extensive knowledge on the law and practice of Marine Insurances, in the last edition by himself in 1817, does not mention any, what would be called modern cases in his time, and for a very sufficient reason, because there are none. Fortunately, however, the principles of the law relating to this subject, were laid down by that great Judge
[*773] Lord Chief Justice *Mansfield*, *to whose talents and enlarged understanding and great industry, the world are indebted for the thorough explanations and illustrations of the whole of this subject, conveyed in language the most lucid, and beautifully impressive and convincing to the mind.

I shall now at once proceed to mention the important cases decided on this part of our subject, by that learned Judge.

First, however, I must refer back to that act of 19 Geo. 2, c. 37, which underwent a good deal of discussion in a previous part of this Treatise, on the subject of 'wagering policies,' and policies on 'interest or no interest.' Section the fourth, which has not been adverted to before, enacts, "that it shall not be lawful to make re-assurance, unless the assurer should be insolvent, become bankrupt, or die; in either of which cases, such assurer, his executors, administrators, or assigns, may make re-assurance to the amount before by him assured, provided it be expressed in the policy to be a re-assurance."

Re-assurance "as understood by the law of *England*, may be said to be a contract which the first assurer enters into, in order to relieve himself from those risks which he has incautiously taken, by throwing them upon other underwriters who are called re-assurers." (*a*) This practice seems to have been copied in this country from many of the commercial states on the continent. Many foreign writers upon assurance have written in favour of it: amongst the most celebrated may be mentioned *Le Guidon*, (*b*) *Roccus*, (*c*) *Emerigon*, (*d*) and *Pothier*. (*e*) And the ordinances of *Louis* the Fourteenth, adopted and followed the idea that prevailed in *France* when the Treatise *Le Guidon* was written, and by an article in that celebrated code of laws, (*f*) it is expressly declared, "that it should be lawful to the assurers to make re-as-
[*774] *surance with other men of those effects which they had themselves previously insured."

But the practice in *England*, when it was unfettered and unrestrained soon became pernicious to a large commercial nation, and instead of conferring the great benefits which were expected from them, as written by those foreign writers, were at length with their companions the "wager policies," which were quite as mischevious, included in the act of 19 Geo. 2, c. 37, which most effectually put a stop to the practice of "wager policies," and also seems by the restrictions in the fourth clause of the act, very nearly as well to have put a stop to the practice in this kingdom of re-assuring.

This being premised, and the enactment being borne in mind, I now proceed to mention the only case upon this subject.

(*a*) Park Ins. 595.
(*b*) C. 2, art. 19.
(*c*) De Assecur, note 12.
(*d*) 1, art. 247.
(*e*) Tit. Assur. No. 96.
(*f*) Ord. of Louis XIV. tit. Assur. art. 20.

This clause came on to be considered, in the case of *Andree* v. *Fletcher*, (*a*) in the form of a special case, by the Court of King's Bench, stating that a re-assurance was made by the defendant on a *French* vessel, first insured by a *French* underwriter at *Marseilles*, who was living, and at the time of subscribing the second policy, was solvent.

The Court, (*Ashurst*, *Buller* and *Grose*, Justices) were unanimously of opinion, that this policy was void: and that every re-assurance in this country, either by *British* subjects or foreigners, on *British* or foreign ships, is void by the statute, unless the first assurer be insolvent, become bankrupt, or die.

A double insurance is where an assured claims to receive two sums instead of one, or the same sum twice over, by reason of his having two insurances upon the same goods on the same ship. A double insurance is not void, but still the assured shall recover no more than the amount of his loss. It being settled that the assured can recover no more than his actual loss, and it being allowed him to fix on which underwriter he chooses, it is a principle of natural justice that *the several insurers should all of them contribute in their several proportions, to satisfy that loss, against which they have all insured. [*775] These principles have been fully settled to be law in cases which I am about to mention.

In the year 1763, in the case of *Newby* v. *Reed*, (*b*) it was held by Lord *Mansfield*, Chief Justice, and agreed to be the course of practice, that upon a double insurance. though the assured is not entitled to two satisfactions, yet upon the first action he may recover the whole sum insured, and may leave the defendant therein, to recover a rateable satisfaction from the other insurers.

Thus also it was determined in a subsequent case at *Guildhall*, of *Rogers* v. *Davis*. (*c*) It was an action on a policy of insurance on a ship from *Newfoundland* to *Dominica*, and from thence to the port of discharge in the *West Indies*. It was a valued policy on the ship and freight; and on the goods as interest should appear. The ship sailed from *St. John's* the 17th of *December*, 1775, and the plaintiff declared as for a total loss. The defendant underwrote for 200*l.*, and has paid into Court 124*l.* This sum was paid on a supposition that the underwriters on a former policy should bear a share of the loss. The plaintiff had originally insured at *Liverpool* on a voyage from *Newfoundland* to *Barbadocs* and the *Leeward Islands*, with an exception of *American* captures: but the plaintiff afterwards, for the purpose of securing himself against captures, and having altered the course of his voyage, made the present insurance. The plaintiff now insisted he was entitled to receive the full amount of his insurance against the defendant, and not to any part from the *Liverpool* underwriters, because the voyage not insured was different from that insured at *Liverpool*. There was, however, a verdict for the plaintiff for his full demand, with liberty for the defendant to bring an action against the *Liverpool* underwriters, if he thought fit.

*So in the case of *Davis* v. *Gildart*, (*d*) an action was brought for money had and received to the use of the plaintiff, who was the [*776] defendant in the last cause, in order to recover a contribution for the loss which the plaintiff had been obliged to pay. It was agreed by both parties to admit, that on the *London* policy, (which was the subject of the former action) 2200*l.* were insured: that on the two *Liverpool* policies 1700*l.* were insured: that the merchant was interested to the amount of 500*l.* on the ship, 300*l.* on the freight, and 1400*l.* on the cargo; that the plaintiff had paid 200*l.* loss, and

(*a*) 2 T. R. 161. (*b*) 1 Black. 416.
(*c*) Sit. in Mich. Vac. 17, Geo. 3, before Lord Mansfield. Park Ins. 601.
(*d*) Sit. Easter Vac. 17 Geo. 3, at Guild. Park Ins. 601.

47*l.* for the costs. The question was, whether the defendant was liable to contribute anything, and what? The whole interest was 2200*l.*, and the whole insurance was 3900*l.* It was insisted by the counsel for the defendant, that the insurance in *London* was an illegal re-assurance; and therefore the plaintiff might have made a good defence in an action brought against him: and if so, he could not now recover over against the defendant.

Lord *Mansfield.*—"The question seems to be, whether the insured has not two securities for the loss that has happened. If so, can there be a doubt that he may bring his action against either? It is like the case of two securities, where, if all the money be recovered against one of them, he may recover a portion from the other. Then this would bring it to the question, whether the second insurance is void as a re-assurance? But a re-assurance is a contract made by the insurer to secure himself; and this is only a double insurance." There was another ground taken in the cause, which is not material to be mentioned here: but upon this direction the plaintiff had a verdict.

2. There is an important case upon this subject, and a very elaborate argument of Lord *Mansfield*, in delivering the judgment of the whole Court of King's Bench, in which most of the questions relative to double insurances are clearly and decisively settled, *Godlin and others* v. *London Association* *Company. (*a*) In this cause the question was, whether the plaintiff ought to recover his whole loss, or only a half? it being objected that there was a double insurance. A verdict was found for the whole, subject to the opinion of the Court upon Lord *Mansfield's* report.

[*777]

Lord *Mansfield*, in delivering the opinion of the Court began by stating the facts, as they appeared to him at the trial.

"Mr. Meybohm, of *St. Petersburgh*, had dealings with Mr. Amyand and Company, of *London*, who often sent ships from *London* to Mr. Meybohm at *St. Petersburgh*. Meybohm, as appeared by the evidence, was indebted, on the balance of their accounts, to Amyand and Company. Amyand and Company sent a ship, called *The Galloway*, Stephen Barker, master, to Mr. Meybohm at *St. Petersburgh*, to fetch certain goods. Meybohm sent the goods, and promised to send the bill of lading by the next post, but never did. Afterwards, in *August*, 1756, Amyand and Company got a policy of insurance from private underwriters for 1100*l.*, on the ship, tackle, and goods, at and from *London* to *St. Petersburgh*, and at and from thence back again to *London;* which policy was signed by several private underwriters, quite different persons from the present defendants; and of this sum of 1100*l.* thus underwritten, 500*l.* was declared to be on $\frac{11}{60}$ parts of the ship, and the remaining 600*l.* to be on goods. Between the 26th of *August*, and the 28th of *September*, 1756, (both included,) Mr. Amyand insured 800*l.* more, with other private insurers: and this latter insurance was upon goods only, and was only at and from *St. Petersburgh* to *London*. On the 28th, 29th and 30th of *October*, 1756, Mr. Amyand insured 900*l.* more with other private insurers, which last insurance was on goods only, at and from the *Sound* to *London*. So that the whole sum insured by Amyand and Company was 2800*l.*, of which the sum of 2300*l.* was on goods, and the remaining 500*l.* was on the ship. Several letters being given *in evidence, it appeared that Meybohm wrote from *St. Petersburgh* on the 7th of *September* 1756, (the date of his first letter on this subject) to Amyand and Company; and mentioned what goods he should send to them, referring to the invoice for particulars; and directed them to get insurance thereon, and to place the goods and the insurance to a particular account which he named in his letter; in which he also specified

[*778]

(*a*) 1 Burr. 489; 1 Black. Rep. 103.

some iron, which was for Mr. Amyand's own account. This letter Mr. Amyand afterwards received (probably about the 27th of *October*) and in consequence of it made the insurance accordingly, upon the 28th, 29th, and 30th of the same *October*, as before-mentioned. Meybohm having shipped the goods, endorsed the bills of lading to one Mr. John Tamesz, in *Moscow* (the plaintiff, in effect, in the present action) who, on the 7th of *October*, 1756, wrote to his correspondent Mr. Uhthoff, here in *London*, to insure these goods. In this letter he desires Mr. Uhthoff to insure the whole, that he (Tamesz) might be safe in all events: for he suspected that these goods were intended to be consigned by Meybohm to somebody else, and perhaps might be insured by some other persons. And he says they were transferred to him in consideration of his being in advance to Meybohm more than their amount. This letter from Mr. Tamesz, with these directions to insure, was received by Mr. Uhthoff on the 15th of *November*, 1756. Mr. Uhthoff accordingly applied to the defendants, the *London Assurance Company*, and disclosed to them, at the same time, all these particulars: and they, upon the 16th of *November*, 1756, after being thus apprised that there might be another insurance, made the insurance now in question for 2316*l.* on the goods at and from the *Sound* to *London*. The goods were lost in the voyage. Mr. Uhthoff's insurance was made by the plaintiffs, Godin, Guyhon and Company, who are insurance brokers; and they declare that this insurance was made by order of Henry Uhthoff, Esq. This declaration is endorsed upon the policy, and is dated the 18th of *November*, 1756. There is no doubt as to the value of the goods, or as to the loss of them. *It is admitted by the defendants, that the plaintiffs ought [*779] to recover half the loss from them, but they say they ought to pay only half, not the whole of the loss. So that the only question is, whether the plaintiffs are entitled, upon the circumstances of this case, and upon the facts I have been stating, to recover the whole loss from the present defendants; or only the half of his loss from them, and the remainder from the underwriters of Mr. Amyand's policy. The verdict is found for the plaintiff for the whole: but it is agreed to be subject to the opinion of this Court, upon the question I have just mentioned.

"First, to consider it as between the insurer and insured. As between them, and upon the foot of commutative justice merely, there is no colour why the insurers should not pay the insured the whole; for they have received a premium for the whole risk. Before the introduction of wagering policies, it was upon principles of convenience very wisely established, that a man should not recover more than he had lost. Insurance was considered as an indemnity only, in case of a loss; and therefore the insurance ought not to exceed the loss. This rule was calculated to prevent fraud; lest the temptation of gain should occasion unfair and wilful losses. If the insured is to receive but one satisfaction, natural justice says that the several insurers shall all of them contribute *pro ratâ*, to satisfy that loss against which they have all insured. No particular cases are to be found on this head; or, at least, none have been cited by the counsel on either side. Where a man makes a double insurance of the same thing, in such a manner that he can clearly recover against several insurers in distinct policies a double satisfaction, the law certainly says that he ought not to recover doubly for the same loss, but be content with one single satisfaction for it. And if the same man really and for his own proper account insures the same goods doubly, though both insurances be not made in his own name, but one or both of them in the name of another person, yet that is just the same thing; for the same person is to have the benefit of both policies. And if the *whole should be recovered from one, he ought to [*780] stand in the place of the insured, to receive contribution from the other, who was equally liable to pay the whole. But in this case if Tamesz

was not to have the benefit of both policies in all events, then it can never be considered as a double policy."

"It has been said, that the endorsement of the bills of lading transferred Meybohm's interest in all policies, by which the cargo assigned was insured; and therefore Tamesz has a right to Mr. Amyand's policy; and that Tamesz, being the assignee of Meybohm, is the *cestui que trust* of it, and may recover the money insured; and even that he may bring trover, or detinue, for the very policy itself: and it is urged from hence, that he either will or may have a double satisfaction for the same loss."

"But allowing that by the endorsement of the bills of lading and assigning the cargo to Tamesz, he stands in the place of Meybohm in respect of his insurances; yet Mr. Amyand has an interest of his own, and had actually insured the ship and goods to the amount of 1,900*l.* (upon both together) prior to any directions or intimation received from Mr. Meybohm, to insure for him. Various people may insure various interests on the same bottom: (as one person for goods, another for bottomry, &c.) And here Mr. Amyand had an interest of his own, distinct from that of Mr. Meybohm: he had a lien upon these very goods as a factor to whom a balance was due. And he had the sole interest in the ship: which was a part of the things insured by him. It is far from appearing, that even his last insurance (in *October*) was made on the account of Meybohm, or as agent for him. So far from it, Mr. Amyand insists upon it for his own benefit, (as he expressly declared at the trial) and absolutely refuses to give it up, or to suffer his name to be used by the plaintiff; though he was a witness for the defendants, and was produced by them, and inclined to serve them. So that the foundation of this argument, urged by the defendants' counsel, fails them; and there is, in reality, nothing to support it.

[*781] But even supposing that Mr. Amyand had made his *insurance, not upon his own account, but as agent or factor for Mr. Meybohm, and upon the account of Meybohm; yet even then Tamesz can never come against Amyand's underwriters, or come at Amyand's policy, to his own use. For Amyand, the factor of Meybohm has possession of the policy, and appears to have been a creditor of Meybohm upon the balance of accounts between them, at the time when he made the insurance: and I take it now to be a settled point, "that a factor to whom a balance is due, has a lien upon all goods of his principal, so long as they remain in his possession." *Kruger and others* v. *Wilcox and others*, was a case in Chancery upon this point. (*a*) It came on first before Sir *John Strange*, then Master of the Rolls, who decreed an account, and directed allowances to be made for what the factor had expended on account of the ship or cargo, and reserved all further directions till after the Master's report. It came on again, afterwards, for further directions, after the Master's report, before the Lord Chancellor, who was attended by four eminent merchants, whom he interrogated publicly. After which he took time to consider of it; and on the first of *February*, 1755, decreed, "that a factor has a lien on goods consigned to him; not only for incident charges but as an item of mutual account for the general balance due to him so long as he retains the possession. But if he part with the possession of the goods, he parts with his lien, because it cannot then be retained as an item for the general account." There was another case, in the same Court, of *Gardiner* v. *Coleman*, a few months after; in which the former case, determined, as I have mentioned, was considered as a point settled; and this latter case of *Gardiner* v. *Coleman* was decreed agreeably to it. So that Mr. Amyand, even considered as factor or agent to Meybohm, and as making the insurance upon Meybohm's

(*a*) Ambler's Rep. 252.

account, is yet entitled to retain the policy; Meybohm being indebted to him upon the balance of the account between them; and he has a lien upon *the policy whilst it continues in his possession. Therefore, [*782] even in this view of the case, Mr. Tamesz must first have paid to Amyand the balance of his (Amyand's) account, before he could have gotten that policy out of Amyand's hands; and consequently Mr. Tamesz was very far from being entitled to the benefit of it as a *cestui que trust*, absolutely and entirely."

"But if the question, 'Whether Tamesz could take the benefit of Mr. Amyand's policy,' were doubtful; yet here, Tamesz insured the goods with the defendants, expressly under the declaration of his suspicion, that there might have been a former consignation, and some former insurance made upon the goods by some other person: but he desired to insure the whole for his own security; and to this the defendants agreed, and took the whole premium. Amyand insisted upon his right to the whole benefit of his own policy, when he was examined as a witness: and is now litigating it in Chancery. It would neither be just nor reasonable, that Tamesz should only recover half of his loss from the defendants, and be turned round for the other half to the uncertain event of a long and expensive litigation. I do not believe there ever will or can be a recovery by Tamesz, or those who shall stand in his place, against Amyand's underwriters. However, if those underwriters are liable to contribute at all, the contribution ought to be among the several insurers themselves: but Tamesz, the insured, has a right to recover his whole loss from the defendants, upon the policy now in question, by which they are bound to pay the whole. For though here be two insurances, yet it is not a double insurance; to call it so is only confounding terms. If Tamesz could recover against both sets of insurers, yet he certainly could not recover against the underwriters of Amyand's policy, without some expense; nor without also first paying and re-imbursing to Mr. Amyand the premium he paid, and also his charges. This is by no means within the idea of a double insurance. Two persons may insure two different interests; each to the whole value; as the master for wages; *the owner for freight, &c. But a double insurance is where the [*783] same man is to receive two sums instead of one, or the same sum twice over for the same loss, by reason of his having made two insurances upon the same goods, or the same ship. Mr. Tamesz is entitled to receive the whole from the defendants, upon their policy; whatever shall become of Mr. Amyand's policy: and they will have a right, in case he can claim anything under Mr. Amyand's policy, to stand in his place, for a contribution to be paid by the other underwriters to them. But still they are obliged to pay the whole to him. Therefore, upon these grounds and principles in every light in which the case can be put, we are all of us clearly of opinion, that it is right, as it now stands for; and that the *postea* must be delivered to the plaintiff."

SECTION VI.

OF THE PROCEEDINGS IN THE ACTION.

HAVING in the seventeenth section of the first Part of this Treatise shewn how policies are in practice actually made, and having likewise shewn how the accounts are settled between the assured, the broker, and the underwriter, and what has been settled by the Courts as to the validity in law of passing such accounts between the three parties; in the present section it is my object

to point out, in the case of either party disputing the payment demanded by the other or disputing as to the character of the loss, which of course makes all the difference in the payment, what steps and proceedings will be necessary for either to take, in the one case to recover by law what the one party claims, and in the other in order to resist it; or in any case, where either of the parties thinks that he has a legal claim against the other.

The relief which, by the law in this country is settled, is generally by an action at law. Though there are cases where either party may, and sometimes [*784] does go to a Court of *Equity for relief, as for instance for an injunction to stop an action at law. (*a*) There are two well known instances in which a Court of Equity will or will not interfere; which are these: at the Common Law it is a maxim that a policy of assurance cannot be altered after it has been signed, (at least not without the consent of the parties) and a Court of Equity will not alter a policy in the absence of strong proof of its being contrary to the intent and agreement of the parties. This was held in the case of *Henkle* v. *Royal Exchange Assurance Company.* (*b*) But where a policy has been drawn up by mistake, in terms which are not conformable to the real intention of the parties, the instrument may be rectified in a Court of Equity by the slip or label, so decided in the case of *Motteux* v. *The Governor and Company of London Assurance.* (*c*) There is another ground for an application to a Court of Equity, where there is a suspicion of fraud on the part of the assured: in such cases, the Court of Equity will compel the party to make a full disclosure upon oath of all the circumstances that are within his knowledge. (*d*) But except in these instances, all issues upon policies of insurance must be tried in the Courts of Common Law.

Even if the parties, by a clause in the policy, agree that in case of a dispute, it shall be referred to arbitration, that will not be a sufficient bar to an action at law, provided no reference has been in fact made, nor is depending.

Thus in *Kill* v. *Hollister* (*e*) in an action upon a policy of insurance it appeared, that a clause was inserted, that in case of any loss or dispute about the policy, it should be referred to arbitration; and the plaintiff averred in his declaration, that there had been no reference. Upon the trial at *Guildhall*, the point was reserved for the consideration of the Court, whether this action would [*785] lie before a reference had been *made; and it was held by the whole Court, that if there had been a reference depending, or made and determined, it might have been a bar: but the agreement of the parties cannot oust this Court; and as no reference has been, nor any is depending, the action is well brought, and the plaintiff must have judgment.

II. Having thus seen in what Courts the party injured in the contract of insurance is to seek for redress, let us now consider, by what form of action that redress is to be obtained.

1. The act of Parliament, by which the two insurance Companies were erected, (*a*) ordered, that they should have a common seal, by affixing which, all corporate bodies ratify and confirm their contracts. (*b*) Hence a policy of insurance made by the *Royal Exchange Assurance Company*, or the *London Assurance Company*, is a contract under seal; and if the contract is broken, the proceedings against these Companies must be by action of debt or cove-

---

(*a*) See Lewen v. Swasso, *ante*, p. 342. (*b*) 1 Ves. 317.
(*c*) 1 Atkyns, 545. (*d*) 2 Atkyns, 359.
(*e*) 1 Wils. 129. And in Thompson v. Charnock, 8 T. R. 139, it was held that a covenant in a deed to refer all matters is not sufficient to oust the Courts of Law and Equity of their jurisdiction.
(*a*) *Ante*, p. 530. (*b*) 6 Geo. 1, c. 18.

rant. (c) From this circumstance a great inconvenience arose; for under the plea of the general issue to an action of debt or covenant, the true merits of the case could seldom come in question: but in order to bring them forward, it became necessary to plead specially. This was attended with such a heavy expense, such great delays, and frequent applications to Courts of Equity for relief, that the Legislature at last interposed, and enacted, "that in all actions of debt to be sued or commenced against either of the said corporations, upon any policy of insurance under the common seal of such corporations, for the assuring of any ship or ships, goods or merchandises, at sea or going to sea, it should and might be lawful to and for the said corporations, in such action or suit, to plead generally, that they owed nothing to the plaintiff or plaintiffs in such *suit or action; and that in all actions of covenant, which [*786] should be sued or commenced against either of the said corporations upon any such policy of assurance under the common seal of such corporation for the assuring of any ship or ships, goods or merchandises, at sea or going to sea, it should and might be lawful for the said respective corporations, in such action or suit, to plead generally, that they had not broke the covenants in such policy contained, or any of them; and if thereupon issue should be joined, it should and might be lawful for the jury, if they should see cause, upon the trial of such issue, to find a verdict for the plaintiff or plaintiffs in such suit or action, and to give so much, or such part only of the sum demanded, if it be an action of debt, or so much in damages, if it be an action of covenant, as it should appear to them, upon the evidence given upon such trial, such plaintiff or plaintiffs ought in justice to have." (a)

2. Wherever the contract of insurance is entered into with a private underwriter, it is done by the insurer merely subscribing his name to the instrument, which is no more than what is called a simple contract; the remedy for a breach of which is by an action of assumpsit, or an action upon the case founded upon the promise and undertaking of the insurer.

3. When a number of actions are brought upon the same policy, it is a constant practice (b) to consolidate them by a rule of Court, or by a Judge's order, which restrains the plaintiff from proceeding to trial in more actions than one, and binds the defendants, in all the others, to abide the fate of that one; but this is done on the condition that the defendant shall not file any bill in equity, or bring any writ of error for delay. The Court will likewise, upon a proper ground being made by the plaintiff, impose any other terms on the defendants which under all circumstances appear reasonable: as that they shall produce at the trial all books, *papers, &c., in their custody, material to the [*787] point in issue: that the defendant, in the action to be tried, shall admit his subscription to the policy, the interest of the assured, the loss, or any other fact upon which the question intended to be tried does not turn, or which is not meant to be seriously disputed. But the Court will not impose any terms on the defendant, out of the ordinary course, without his consent, which, however, a defendant who only means to litigate fairly will not refuse, when it is only to save the trouble and expense of proving facts which are not disputed. And, on the other hand, the Court will impose any reasonable counter terms on the plaintiff which the defendant may have to propose. (c)

(c) By the 39 Geo. 3, c. 83, the Globe Insurance Company was incorporated, and by the 9th sect. the same pleas and the same power to the jury to assess the damages, are given as in the case of the Royal Exchange and London Assurance Companies, and in other corporate Insurance Companies.

(a) 11 Geo. 1, c. 30, s. 43. And by Reg. Gen., Trin. Term, 1 Vict. the words "by statute" must now be inserted in the margin of the plea.

(b) See *ante*, p. 681, in the case of Thelluson v. Staples.

(c) See March. vol. 2, ch. 16, s. 4.

It was formerly thought that a consolidation rule bound the plaintiff as well as the defendant, and that the Court or Judge could not, though fresh evidence had been discovered, permit the plaintiff to try the other actions. But the contrary has now been decided in the case of *Doyle* v. *Douglas*, (*b*) in which a consolidation rule had been entered into, whereby ten of the defendants agreed to be bound by the verdict in the first action, *Doyle* v. *Dallas*, to make certain admissions, and bring no writ of error, and file no bill in equity for delay; and the proceedings were to be delayed in the last ten actions till after the trial of the first. The defendant had the verdict, and judgment was signed, and execution issued for the costs. No levy was made, as the plaintiff's goods were moved out of the way. The case of *Doyle* v. *Douglas* being set down for trial, a rule was obtained to show cause why the proceedings in *Doyle* v. *Douglas* should not be stayed till the plaintiff should have paid the costs in *Doyle* v. *Dallas*, and why the defendant should not be allowed to issue execution.

Per Curiam.—"To grant this rule, would be stretching the authority of the [*788] Court farther than we are entitled to *carry it. By the practice contended for, the plaintiff, as well as the defendant, would be bound by the consolidation rule. The defendant may issue execution, but the cost of the rule must be discharged." (*a*)

And in the case of *Doyle* v. *Anderson: Doyle* v. *Stewart*, (*b*) where a plaintiff brings several actions upon the same policy of insurance against several underwriters, the Court will not, without the consent of the plaintiff, make a consolidation rule upon the terms of both plaintiff and defendant, being bound in all the actions by the event of one. The Court saying, "that they could not force a party to accept a benefit, for which he does not ask, and impose conditions on him for so doing."

In a later case of *Hollingsworth* v. *Broderick, &c.*, (*c*) however, then the preceding, where two actions had been brought by the same plaintiff on the same policy of insurance against different defendants, the Court ordered them to be consolidated, after a declaration had been delivered in one, and an appearance entered in the other, at the instance of the defendant, in the latter action, though the plaintiff objected.

But in the case of *Ohrly* v. *Dunbar*, (*d*) where sixty-five actions were brought by one party on policies of insurance against individual underwriters and incorporated companies, for sums amounting in the whole to 27,000*l.*, the defendants obtained a consolidation rule, which bound the plaintiff as well as the defendants. One cause was tried, the plaintiff had a verdict, and a rule was [*789] granted for a new trial on *affidavit of surprise and merits. Two of the defendants had died, and the plaintiff alleged that whilst the case stood over he lost the interest of the 27,000*l.* The Court, on these grounds, refused to direct the money to be paid into Court or invested, to wait the event of the cause, in which the rule *nisi* had been granted.

4. As the action on a policy of assurance is of a transitory nature, the venue, if laid in a county different from that in which the cause of action

---

(*b*) 4 B. & Ad. 544. The defendant had been ruled by a Judge's order not to issue execution.

(*a*) In Long v. Douglas, Mich. T. 1831, where the plaintiff failing in the first cause, gave notice of trial in another, the costs of the first remaining unpaid. A rule was obtained for staying the proceedings. The Court discharged the rule. Lord Tenterden, observing, however, that where the plaintiff proceeded in a second consolidated action without applying to the Court, he was not entitled to have the benefit of any terms imposed on the defendants by the rule. (*b*) 1 A. & E. 635.

(*c*) 4 A. & E. 646, and see the rule which was drawn up by consent in that case.

(*d*) 5 A. & E. 824.

accrued, may be changed by the defendant in the usual manner, (*a*) unless the policy be under seal; (*b*) in which case the Court will not change the venue without some special reason being shown to induce them to depart from the general rule. And the venue cannot be changed when the cause of action arises out of the realm. (*c*)

5. The next consideration is, the declaration in the action; and as, of course, the form of the policy upon which the action is brought must be inserted in the declaration, I must state, therefore, what is required of the policy, before it can be read in the declaration as the ground of the action.

1stly,—It is necessary that the day, month, and year, on which the policy is executed should appear upon the instrument itself.

2ndly,—That the policy has a stamp required by law. (*d*)

It is my intention now to present, for the attention as well as information of the reader, some forms of declarations and pleas on marine policies, and I shall make such references in the body of the declaration as I think are necessary to the pages of the first part of this Treatise, where the very words of the policy are fully treated of. I may, however, first observe, that, in the Treatise itself, it will be seen that in many instances the declaration and pleas are frequently *stated and referred to; and, in most cases, I have stated how a particular loss is to be averred in the declaration. [*790]

By Reg. 5, H. T., 4 Wm. 4, it is ordered that "two counts on the same policy of assurance are not to be allowed. But a count upon a policy of insurance, and a count for money had and received to recover back the premium, implied by law, are to be allowed. The account stated may be joined, and there may be several breaches to the same contract." And by 3 & 4 Wm. 4, c. 42, s. 29, interest is recoverable.

The first form of a declaration which I shall state, is one on a policy "on goods," averring a total loss by "perils of the sea."

The declaration stated:—"For that whereas the plaintiff, (*a*) heretofore to wit on, &c. (*b*) caused to be made a policy of assurance, (setting it out *verbatim*) purporting thereby and containing therein, that Messrs. Boggs, Taylor, & Co., as well in their own names, as for and in the names of all and every person or persons to whom the same did, might, or should appertain in part or in all, did make assurance, and cause themselves, and them and every of them to be insured with the *General Maritime Assurance Company*, 'lost or not lost' (*c*) at and from *Bombay* to *London*, with leave (*d*) to call at all ports and places on either side of, and at the *Cape of Good Hope*, including the risk of craft to and from the vessel (*e*) upon any kind of goods and merchandise, and also upon the body, tackle, &c., of and in the ship at —— (*f*) and upon the said ship, &c., —— (*f*) and so *should continue and endure during her abode there, upon the said ship, &c.; and further until the [*791] said ship with all her tackle, &c., and goods and merchandise whatsoever,

---

(*a*) See 1 Saund. 74 *a*, n. (2), n. (*c*), 6th edit. 2 T. R. 275. Jones v. Pearce, 2 Dowling, 54. Tidd. 624. Form of Affidavit, Chitty's Forms, 553. 1 Saund. 74 *a*, n. (2), n. (*c*), and see 8 M. & W. 640; 2 Str. 1160.

(*b*) 1 T. R. 782 *a*. (*c*) Tidd. 623, 7 T. R. 205.

(*d*) The duties on marine policies are fixed by 7 Vict. c. 21; see the Sched. to that Act.

(*a*) See *ante*, p. 3, where the persons are stated who, according to 28 Geo. 3, c. 56, can sue on a marine policy of assurance. And see by Reg. Gen. H. T. 4 Wm. 4. r. 5.

(*b*) The date of the execution of the policy in the margin.

(*c*) See *ante*, p. 12.

(*d*) See *ante*, p. 208, as to the clause "with leave," &c.

(*e*) See *ante*, p. 149, as to this clause of "including the risk to and from the vessel," which varies from the ordinary printed form, but which is now frequent in practice.

(*f*) These were left blank in the policy.

should be arrived at ——; (*a*) and upon the said ship, &c., until she had there moored at anchor twenty-four hours in good safety, and upon the said goods and merchandise until the same should be there discharged and safely landed. The insurance was declared to be on 360 bales of cotton, and the policy, after admitting the receipt of the premium, stated, that the said company were content, and did take upon them that assurance for the sum of 2,000*l.* The declaration then alleged, that in consideration of the premises, and that the plaintiff at the request of the defendants, (then being three of the directors of the said company) then paid to the said company the sum of 40*l.* as a premium for the assurance of 2,000*l.* upon the said goods, on the said voyage in the policy mentioned, and then promised the defendants to perform and fulfil all things in the policy mentioned, on the behalf of the assured to be performed and fulfilled, the defendants then promised the plaintiff that the said company would become and be assurers to the amount of the said sum of 2,000*l.* upon the said goods in the said ship in the policy mentioned, and would perform and fulfil all things therein mentioned on their part and behalf, as assurers of the sum of 2,000*l.* to be performed and fulfilled: that the said goods were, on the 1st of *September*, 1841, shipped at *Bombay* on the said voyage: that the plaintiff was, during the said voyage, to wit, (*b*) on the same day and year last aforesaid, interested (*c*) in the said goods in the said policy mentioned, and so loaded on board the said ship, to the amount insured: that the said insurance was made for the use and benefit, and on account of the plaintiff as aforesaid: [*792] the said ship afterwards sailed *on the said voyage, and being injured by tempestuous weather, became filled with water, whereby the said goods were wetted and damaged, and rendered of no use or value to the plaintiff.

The second form of a declaration which I shall state is one on a policy on "ship," averring the total loss by "perils of the sea."

This was an action on a policy of insurance "for twelve calendar months, commencing the 1st *May*, 1835, and ending 30th *April*, 1836, both days inclusive, in port or at sea, in all places, at all times, and on all services, upon any kind of goods and merchandises, and also upon the body, tackle, apparel, ordnance, munition, artillery, boat and other furniture of and in the good ship or vessel called the *Sherburne*, valued at 8,000*l.*" The declaration, after setting out the policy, and averring the plaintiff's interest in the ship, stated that on the 1st of *May*, 1835, the said ship was in safety in harbour, at *Bombay*, in the *East Indies;* that afterwards, and before the 30th *April*, 1836, to wit, on the 20th *August*, 1835, whilst the said ship was protected by the said policy, the said ship was, by the perils of the sea and by stormy and tempestuous weather, and by the violence of the winds and waves greatly strained, bulged, broken, and otherwise damaged in her body, rudder, bowsprit, irons, and other parts, whereby it became necessary to repair the damage done to the said ship as aforesaid; that after such damage had arisen as aforesaid, and in consequence thereof, the plaintiff, by himself and servants and agents, to wit, on the day and year last aforesaid, did labour for, in, and about the safeguard, safety, and preservation of the said ship or vessel, and in so doing, and in and about the necessary repair of the said ship, by reason of the damages so by him sustained as aforesaid, did necessarily lay out and expend a large sum of money,

(*a*) See note (*f*), p. 790.

(*b*) This allegation is not in the usual form, see *ante*, p. 13, where the defendants admitted it in their plea, and where the declaration was supported, and the plea held bad on demurrer.

(*c*) Every declaration must contain the name of the person or persons interested in the policy. See Cousins v. Nantes, 3 Taunt. p. 513, and *ante*, sect. 4, where the law of interest is fully discussed.

to wit, the sum of 1,000*l.*, whereby the defendant according to the terms of the said policy, and of his said promise and undertaking, then became liable to pay, and ought to have paid the plaintiff 150*l.*, being the rateable proportion of the *expense aforesaid, which the defendant ought to have paid and contributed in respect of the insurance aforesaid, whereof the [*793] defendant then had notice, (*a*) and that afterwards, and during the continuance of the risk, and whilst the said ship in the said policy of insurance mentioned was protected by the said policy, to wit, on the 10th of *October*, 1835, the ship, in the said policy mentioned, by stormy weather, &c., became and was wholly lost to the plaintiff, of which premises he, the defendant, had notice.

There was also a count for money had and received, and a count upon an account stated.

Thirdly,—The declaration after setting out a policy of insurance, in the usual form, dated 19th *October*, 1792, on the *Petronelli* "at and from *Bayonne* to *Martinique*, and at and from thence to return to *Bayonne*," and making all the necessary averments, proceeded: "And the said Joseph Furtado further says, that afterward and after the said ship had so arrived at *Martinique* aforesaid, in the said writing or policy of assurance mentioned, and whilst she remained there and before her departure from thence, in further prosecution of her said voyage, to return to *Bayonne* aforesaid, to wit, on the 12th day of *November*, in the year of our Lord, 1793, the said island of *Martinique* was with force and arms, and in a hostile manner, attacked, captured, and taken by the forces of our present sovereign Lord the now King, then being at enmity and open war with the said island, and the persons exercising the powers of government in the same; and the said ship then and there being at the said island as aforesaid, then and there on the capture of the same, was then and there seized, taken, and captured by the said forces of our said Lord the King, as a prize, and thereby the same ship with all her tackle, apparel, ordnance, munition, boat, and other furniture thereof became and was totally lost to the *said Joseph Furtado, to wit, at *London* aforesaid, in the parish [*794] and ward aforesaid."

Fourthly.—This was an action of assumpsit on a policy of assurance. The declaration stated that the plaintiff caused himself to be insured, "lost or not lost," at and from *Calcutta*, or any port or ports, place or places, all or any, and in any succession, on the *Coromandel* coast, to any port or ports, place or places, in *Bourbon*, upon any kind of goods and merchandises, and also upon the body, tackle, apparel, ordnance, munition, artillery, boat, and other furniture of, and in the good ship called *La France*, beginning the adventure upon the said goods and merchandises, from the loading thereof on board the said ship at as aforesaid, upon the said ship at as aforesaid, and so to continue and endure upon the said ship until she should be arrived at *Bourbon* aforesaid, and be moored at anchor "twenty-four" hours in good safety, and upon the goods and merchandises, until they should be discharged and safely landed. It was to be lawful for said ship in that voyage, to proceed and sail to and touch and stay at any port or ports, place or places whatsoever, without prejudice to this insurance: the said ship, goods, and merchandises, &c., for so much as concerned the assured, by agreement between the assured and assurers in this policy, are to be valued at 1,000*l.*: the perils the assurers were contented to take themselves, were of the sea, &c., and all other perils, losses and misfortunes that had, or should come to the detriment, or damage of the said goods and merchandises or ship,

---

(*a*) See *ante*, pp. 443, 449, that the assured cannot recover the expense which would have been incurred if a certain damage had been repaired, which it was not, owing to the subsequent total loss of the ship.

or any part thereof: and by a certain memorandum made on the said writing or policy of assurance, the said assurance was declared to be on 1,000*l.* on the "freight" of the said vessel, valued at 1,000*l.* Averment of promise by the defendant to become an assurer, in consideration of having received the premium; of interest in the assured; that the ship was in good safety at a certain port on the *Coromandel* coast, called *Coringa;* and that whilst the ship was at *Coringa* aforesaid, and before the time of the loss thereinafter mentioned,

[*795] divers goods and merchandises amounting *to a full cargo of the said ship, which had been bought, procured, and contracted for, for and on account of the said person so interested in the subject-matter of insurance as aforesaid, were there, to wit, at *Coringa* aforesaid, for the purpose of being shipped and loaded, and which, but for the loss thereinafter mentioned, would have shipped and loaded in and on board the said ship, to be conveyed therein on the said voyage in the policy of assurance mentioned, to wit, from the *Coromandel* coast aforesaid to *Bourbon* aforesaid; that afterwards, and whilst the ship was at *Coringa* aforesaid, and during the continuance of the risk in the said policy mentioned, to wit, on, &c., the said ship was broken, damaged, and destroyed, and rendered wholly incapable of pursuing the said voyage aforesaid, by certain perils which the said assurers by the said policy did take upon them as aforesaid, to wit, by the accidental breaking and giving way of the tackle and supports, whereby the said ship was supported, in being moved from a certain dock; in consequence of which breaking and giving way, the ship violently struck against the sand, and was bilged, broken, destroyed, damaged, and rendered incapable of pursuing the said voyage as aforesaid; and the said ship and the freight, and all benefit, profit, and advantage which the said person so interested as aforesaid, would have derived and acquired from the employment of the said ship in carrying and conveying the said goods and merchandises on the said voyage in the said policy mentioned, and the means of carrying and conveying the said goods and merchandise were by the means aforesaid wholly lost to the said person so interested as aforesaid; whereof the defendant, afterwards to wit, on, &c., had notice; by reason whereof, the defendant became and was liable to pay, and ought to have paid the sum of 200*l.* so by him insured as aforesaid.

There was also a count for money had and received, (*a*)

[*796] *6. The plaintiff or his attorney, having delivered his declaration to the defendant or his attorney, the defendant must plead to the declaration. And by the rules of H. T. 4 Wm. 4, the plea of non-assumpsit operates only as a denial "of the subscription to the policy by the defendant, and not of the interest, of the commencement of the risk, of the loss, or of the alleged compliance of warranties." And all matters in confession and avoidance of the action, as unseaworthiness, misrepresentation, concealment, deviation, and various other defences must be especially pleaded."

The plea of money paid into Court, (*b*) may be either for the purpose of meeting an average loss sustained by the ship or cargo, or often a general average upon the cargo. And to the money counts, the defendant frequently pays the value of the premium into Court. The plaintiff, after a delivery of a plea of payment of money into Court, shall be at liberty to reply to the same by accepting the sum so paid into Court in full satisfaction, and discharge of the cause of action in respect of which it has been paid in; and he shall be at

(*a*) The reader is here referred to page 505 of this Treatise, where he will find fully stated the declaration, pleas, and replication, in the recent and important case of Milward v. Hibbert, 3 Q. B. 120.

(*b*) The form Reg. Gen. 1 Vict.

liberty in that case to tax his costs of suit, and in case of non-payment thereof within forty-eight hours, to sign judgment for his costs so taxed; or the plaintiff may reply, "that he has sustained damages, (or, "that the defendant was and is indebted to him," as the case may be.) to a greater amount than the said sum; and in the event of an issue thereon being found for the defendant, the defendant shall be entitled to judgment and his costs of suit.

When the assured are not entitled to recover on the policy, but are entitled to a return of premium, money should be paid into Court, on the count for money had and received. The payment of money into Court admits the contract stated in any count to which the payment applies; on a special count it admits the special contract declared upon; on an *indebitatus* count, it admits a liability on some one or more contracts, to the amount of the sum paid in; (*b*) and therefore *the Court of King's Bench held, in the case of [*797] *Andrews* v. *Palsgrave*, (*a*) that where the defendant paid money into Court generally on a declaration containing a count in a policy of insurance, and the common money counts that that was an admission of the policy as stated in the declaration, and that the defendant could not show by evidence that the original terms of the insurance was that the risk was only to continue for twenty-four hours, and that it was afterwards altered by the broker without their knowledge. But where another defendant, in another action on the same policy, had paid money into Court on the count for money had and received, in another action on the same policy, and the broker proving the alteration to have been made, as above stated, the plaintiffs were nonsuited. But in the case of *Muller* v. *Hartshorne*, (*b*) which was an action on a policy on goods, and the defendant had paid money into Court generally on the whole declaration, and the only question in the cause was fraud in effecting the policy after the ship had sailed and was lost, and the plaintiff contended that the defendant having paid the premium into Court generally on the declaration, was precluded from going into a question of the validity of the contract, but must confine himself to such as only went to reduce the value of the goods insured, Lord *Alvanley*, C. J., held, that as the plaintiff had by his conduct up to the time of the trial, in allowing the defendant after paying the premium into Court, to go on preparing his defence to meet the only point in question, viz: that of fraud, that he was not in a situation to avail himself of such an objection.

But it is to be observed that a plaintiff, in setting forth the ground of his demand upon the defendant, is at liberty to state different claims upon the record, though inconsistent with each other, without subjecting himself thereby to have one of such claims set up in answer to the other. (*c*) Whatever *issues are joined upon any counts or pleas, are to be [*798] tried by the jury distinctly from each other. If not guilty, and a justification is pleaded to a declaration in trespass, the admission of the trespass in the justification will not entitle the plaintiff to a verdict on the plea of not guilty. (*a*)

And therefore in the case of *Gould and others* v. *Oliver*, referred to in a former part of this Treatise, (*b*) which was an action brought by the freighters on a charter-party against the owners for an improper stowage of the cargo, and there was a second count in the declaration, claiming a contribution for a

---

(*b*) See Kingham v. Robins, 5 M. & W. 94. Stapleton v. Nowell, 6 M. & W. 9.

(*a*) 9 East, 325. See also Mellish v. Allnutt, 2 M. & S. 106. Rucker v. Palsgrave, 1 Taunt. 419. Evereth v. Bell, 7 Taunt. 450.

(*b*) 3 Bos. & Pull. 556.

(*c*) By the Court in Gould v. Oliver, 2 Scott's N. R. 262.

(*a*) Harrington v. Macmorris, 5 Taunt. 228. Montgomery v. Richardson, 5 C. & P. 247. Edmunds v. Groves, 2 M. & W. 642.

(*b*) *Ante*, p. 20.

general average in respect of the deck cargo, which had been thrown overboard in tempestuous weather, and the ship afterwards saved, and which count averred a stowage of the plaintiffs' goods according to the custom of trade, and the defendant had paid money into Court on that count, which the plaintiffs took out in satisfaction of that part of their demand, it was held by the Court that this fact could not at the trial be given in evidence as an acknowledgment by the plaintiffs that the goods had been properly stowed. And Lord Chief Justice *Tindal*, who delivered the judgment of the Court, observes,—"The effect of the pleadings is this: the plaintiffs claim a total loss upon their goods, in consequence of the misconduct of the defendant; and, in case they should fail in establishing such misconduct in the defendant, they claim a partial compensation for the sacrifice of their goods in the shape of general average. The defendant, admitting the second claim, pays it into Court, which the plaintiffs take out, having no claim in this view beyond the amount paid in. But, in so doing, they do not abandon the claim which they have preferred in the first count of the declaration, and upon which issues remain to be tried. They would not, indeed, be permitted to retain the whole amount of loss under the first count, and the amount of general average under the second; but they are [*799] not to be *deprived of their right to insist that a total loss has been sustained by the misconduct of the defendant. (*a*)

In the very late case of *Harrison* v. *Douglas*, (*b*) which was an action, not on a common marine policy, but one in which the plaintiff, the defendant, and other persons, were mutual insurers on their respective ships for the period of one year, the payment of money into Court was held to amount, first, to a waiver of an objection of the non-performance of a condition precedent; and, secondly, to a waiver of an otherwise valid objection, that the action was brought too soon. The policy contained at the foot of it a condition that all ships were to be inspected and approved of by a majority of the committee of insurers before admission; that all ships should be well found, &c., and otherwise in a seaworthy state; that all vessels should have a certain quantity of rope or chain cable, according to their respective burthens, and that all "chain cables should be properly tested;" and, in case of non-compliance with orders to repair made by the committee or the inspector, the parties neglecting to be uninsured. The policy declared that certain rules should be deemed a component part of the policy. And by one of the rules the assured was not entitled to be paid in case of a loss, till a period which was shewn by the evidence not to have happened at the time this action was brought. The money was paid into Court on two counts, one of which was on the policy, averring generally a performance by the plaintiff of all things in the policy contained to be performed on his part, and a compliance with all the conditions referred to; and on a count for money had and received, and on an account stated. At the trial, the defendant contended that the plaintiff should be nonsuited on two grounds, first, that the chain cable of the ship was not properly tested according to the first rule; and secondly, that the action was brought too soon under the other rule above referred to; and the defendant had leave given him to move on both [*800] these grounds. *The judgment of the Court was afterwards delivered by Lord Chief Justice *Denman*, who said that the Court were of opinion that the chain cable being properly tested, taken by itself, without more, was not a condition precedent; but that, suppose it was otherwise, it was in the nature of a want of seaworthiness, and the opinion of the jury should have been taken on it; and that, independently of that, they thought that by payment of money into Court, the objection, if it ever existed,

(*a*) See 2 Scott's N. R. 263. (*b*) 3 A. & E. 396.

was cured; for that admitted that the plaintiff was entitled to recover something, which he could not be, if the vessel were not seaworthy. And that as to the second ground of nonsuit, there was no doubt but that the action was brought too soon; and that it would be a cause of nonsuit, if it had not been for the paying money into Court: that that admitted to some extent, at least, that the plaintiff was entitled to recover. (*a*)

Having mentioned the effect of paying money into Court by the defendant, I come now to state one or two examples of pleas as I said I intended to do.

The first pleas I shall mention are those which were in fact pleaded by the defendant to the declaration, form of No. (1.) (*b*)

The defendants pleaded eight pleas, (but we shall confine ourselves to a part of them.)

The defendants pleaded in the first place non-assumpserunt.

Secondly, for a plea in this behalf they stated; that true it was that the policy of assurance purporting and containing therein that Boggs, Taylor & Co., did make assurance of the matters and things according to the terms and provisions of the said policy, as in that behalf in the declaration mentioned and set forth, was made, to wit, upon the day in that behalf in the declaration alleged: yet the defendants said, *that the said policy was not caused to be made by or on behalf of the plaintiff, in manner and form as alleged: concluding to the country. [*801]

Thirdly, for a plea in this behalf, the defendants say that the plaintiff did not, nor did any person on his behalf pay the said premium or any part thereof, nor promise the defendants to perform and fulfil the things in the said policy mentioned, on behalf of the assured to be performed and fulfilled in manner and form alleged: concluding to the country.

Eighthly, for a plea in this behalf the defendants say, that although the said ship with the said goods on board, set sail upon the voyage from *Bombay* to *London*, and although the said goods were damaged and diminished in use and value on the said voyage, as in the declaration mentioned; and although, after the commencement and during the course of the said voyage, and after the ship had sailed on the said voyage for divers, to wit, thirty-five days, and for divers, to wit, 1,000 miles, the plaintiff aequired an interest in the said goods, to wit, to the value and amount in that behalf mentioned: nevertheless, that the said goods were so damaged and diminished in value as in the declaration mentioned before the plaintiff acquired or had any interest therein, to wit, upon the 20th day of August, A. D. 1841. Verification.

The plaintiff demurred specially to the second and third pleas, on the ground that they amounted to pleas of the general issue, and that the matters alleged in them ought to have been given in evidence under the issue joined in that plea; and pleading in the manner as pleaded by the defendants tended to unnecessary prolixity and delay. To the eighth plea, the plaintiff demurred generally: and the point marked for argument on his part was, that a policy being made "lost or not lost," the defendants were responsible for the loss, notwithstanding it happened before the plaintiff acquired an interest in the goods. (*c*)

*I shall now state the pleas which were pleaded to the second form of declaration. (*d*) [*802]

(*a*) See the cases of Meager v. Smith, 4 B. & Ad. 673. Lundie v. Robertson, 7 East, 231. Early v. Bowman, 1 B. & Ad. 889, as to the effect of the admission by payment of money into Court on the question as to the performance of a condition precedent.

(*b*) *Ante.*

(*c*) *Ante*, p. 33, and see 11 M. & W. 299.

(*d*) *Ante*, p. 792.

First, as to so much of the first count as states that the vessel was by the perils and dangers of the sea, and by stormy and tempestuous weather, and violence of the winds and waves, greatly strained, bulged, broken, and otherwise damaged, and that the plaintiff by reason thereof laboured for and about the safeguard, safety, and preservation of the said ship, and that the plaintiff did, after such damage had arisen, and in consequence thereof, labour for and about the safeguard, safety and preservation of the vessel, and in so doing, and in and about the necessary repairs of the said vessel, by reason of the damages, did necessarily lay out and expend a large sum of money—the defendant said, that the plaintiff ought not further to maintain his action, because the defendant brought into Court the sum of 18*l.* 18*s.* ready to be paid to the plaintiff, and the defendant said that the plaintiff had not sustained damages to a greater amount than the said sum of 18*l.* 18*s.*, in respect of so much of the cause of action in the introductory part of that plea mentioned; and this he is ready to verify, wherefore he prayed judgment, if the plaintiff ought further to maintain his action in respect of the premises in the introductory part of the plea mentioned.

Secondly.—As to so much of the first count as stated, that the said ship or vessel was lost by stormy winds and tempestuous weather, or by the perils or dangers of the sea—that the said ship or vessel was not lost by stormy winds and tempestuous weather, or by the perils or dangers of the sea, as in the first count mentioned; concluding to the country.

Thirdly.—To the second and third counts, *non assumpsit.* (*b*)

Pleas to fourth form of declaration. (*c*)

The defendant pleads.—First, that the goods and merchandises in the declaration in that behalf mentioned, had not before and at the time of the loss in the [*803] first count *mentioned, been bought, procured, and contracted for, for and on account of the said person in the declaration in that behalf mentioned, to be carried and conveyed in the said ship.

Secondly.—That at the time of the loss in the declaration mentioned, the risk in the said writing or policy of insurance mentioned, had not commenced, and the said writing or policy of insurance had not attached in manner and form as in and by the declaration was alleged.

Thirdly.—That the said ship was not at the time of the commencement of the risk insured against by the said policy in the declaration mentioned, seaworthy.

Fourthly.—That the said ship was not broken, damaged, and destroyed, and rendered incapable of pursuing the said voyage by any perils which the said assurers by the said policy did take upon themselves, in manner and form as in and by the said declaration was alleged.

Fifthly.—That the ship was not at any time after the making of the said policy, and before the said loss in the first count mentioned, in good safety at any port or place on the *Coromandel* coast in the said policy mentioned, in manner and form as by the declaration was alleged.

Sixthly.—As to the money alleged to have been received by the defendant to the use of the plaintiff, that the defendant brought into Court 20*l.* 10*s.*, beyond which the plaintiff had sustained no damage.

Seventhly.—To the residue of the declaration, that the defendant did not promise *modo et formâ.*

6. The issue having been joined, it is necessary to show how the plaintiff is to prove his case. Proof of the defendant's subscription to the policy, or of some person subscribing for him by his authority, may in some cases be necessary, though the subscription is in ordinary cases admitted.

(*b*) 5 Scott's N. R, 928. (*c*) *Ante*, p. 794, and 7 Scott, 509.

In the case of *Neale* v. *Erving*, (*d*) where an action was brought upon a policy in which the policy was signed by one *Hutchins, for the defendant. The witness said he did not know by what authority, [*804] but that Hutchins had been in the constant habit of subscribing policies for the defendant, and had done several for the witness, and for others, to his knowledge. Lord *Kenyon* was of opinion, that the acts of Hutchins held him out to the world as properly authorized, and his having subscribed several policies was sufficient to bind the defendant, who, and not the plaintiff, ought to prove that his power was limited. And where a witness stated that he was authorized by a power of attorney, but added, that the defendant had been in the habit of paying losses upon policies, which the witness had subscribed in his name. Lord *Ellenborough* ruled that the power of attorney need not be produced. *Haughton* v. *Ewbank*. (*a*) But in the case of *Courteen* v. *Touse*, (*b*) where a witness proved the agent's handwriting, and swore he had often seen him sign policies for the defendant, but he had never seen any general power of attorney from the defendant to the agent, nor did he know that the defendant had given the agent any authority to sign the policy in question, nor was he acquainted with any instance in which the defendant had paid a loss upon a policy so subscribed: Lord *Ellenborough* held that the proof of agency must be carried further.

7. The plaintiff having averred in his declaration, that he is interested to the amount of the property insured, it is necessary that he should prove his interest in the subject-matter, but in a valued policy it is not required of him to prove the whole. This will be done by the production of the bills of sale, bills of parcels, and the costs of the outfit; the bills of lading signed by the master, specifying the goods received on board, and for whom he is to carry them. In addition to the bill of lading, &c., it is usual to call the captain or some other person to prove that the goods mentioned in it were actually on board. *M'Andrew* v. *Bell*. (*c*) The case of **Caldwell and others* v. *Ball*, (*a*) [*805] was a case where the law relating to bills of lading was much considered. The Court held that a bill of lading is an acknowledgment under the hand of the master, that he has received such goods, which he undertakes to deliver to the person named in the bill of lading; that it is assignable in its nature, and by endorsement the property is vested in the assignee.

But if, as in the case of *Haddow* v. *Parry*, (*b*) the master qualifies his acknowledgment by the words "contents not known," the bill of lading is not evidence. If the master is dead, proof of his death and his handwriting is sufficient. (*c*) But it was held in *Dickson* v. *Lodge*, (*d*) that the bill of lading is not evidence of the shipment if the master be alive, he ought to be called, or the mate, or some party acquainted with the fact.

8. If the assured has exercised acts of ownership, in directing the loading, &c., of the ship, and paying the people employed, this has been held to be *primâ facie* sufficient proof of ownership in the vessel. *Amery* v. *Rogers*. (*e*)

In the case of *Robertson* v. *French*, (*f*) it is laid down that the ordinary mode is to call the captain of the vessel to prove that he was appointed and employed by the parties, and even should it appear on cross-examination that

---

(*d*) 1 Esp. 61.
(*a*) 4 Camp. and see Broclebank v. Sugrue, 5 C. & P. 21.
(*b*) 1 Camp. 43. (*c*) 1 Esp. 373.
(*a*) 1 T. R. 205. See Bryans v. Nix, 4 M. & W. 775.
(*b*) 3 Taunt. 303. (*c*) See the Factors' Act.
(*d*) 1 Stark. 226
(*e*) 1 Esp. R. 207, and see Thomas v. Foyle, 5 Esp. 88. Abbott on Shipp. 78 (6th edit.) (*f*) 4 East, 137.

the ownership was devised to those persons under a bill of sale, it is not on that account necessary to produce the bill of sale on the ship's register, or to give any further proof of their property: the mere fact of their possession as owners being sufficient *primâ facie* evidence of ownership, without the aid of any documentary proof or title deeds on the subject, until some further evidence should be rendered necessary in support of the *primâ facie* case of ownership which is made in consequence of the adduction of some contrary proof on the other side. *And it was also held that such parol evidence of ownership, at a particular period, was not disproved by the production of a prior register in the name of another and subsequent register to the same person upon a sale under a decree of the Vice Chancellor's Court, those being perfectly consistent with the title in other persons in the meantime. *Sutton* v. *Buck*. (*a*)

[*806]

And in the case of *Pirie* v. *Anderson*, (*b*) it was held the original certificate of the ship's registry is no evidence for the plaintiff on a policy of assurance that the interest in the ship is in the persons in whom it is averred. And because the title of the ship is not complete without the register that is no reason why the register alone should be proof of the title.

In *Flower* v. *Young* (*c*) Lord *Ellenborough* says, "how can the register be evidence for a man? It may be evidence against him if he has signed it; but it can amount to no more than a declaration that he is owner, which a man cannot convert into evidence of his own title. If the register were recognized as a public document to prove the ownership, it would be evidence both against and for all the persons whose names appear upon it. However, we can consider it as a private instrument only; and, therefore, although it be evidence as an acknowledgment against the persons who sign it, it cannot be evidence in their favour." (*d*)

But as in *Reid* v. *Darby*, (*e*) if the title of the ship really comes into question, no claim can be set up in opposition to the Legislative enactments on this subject. The Registry Acts are now consolidated and comprised in one act, 3 & 4 Wm. 4, c. 55, by which it is enacted, "that no ship or vessel *shall be entitled to any of the privileges or advantages of a *British* registered ship unless the person or persons claiming property therein shall have caused the same to be registered, in virtue of the 6 Geo. 4, c. 110, or of the 4 Geo. 4, c. 41, or until such person or persons shall have caused the same to be registered in manner thereinafter mentioned, and shall have obtained a certificate of such registry from the person or persons authorized to make such registry, and grant such certificate as thereinafter directed." (*a*) And it is further enacted, "that in case any ship or vessel not being duly registered, and not having obtained such certificate of registry as aforesaid, shall exercise any of the privileges of a *British* ship, the same shall be subject to forfeiture, and also all the guns, furniture, ammunition, tackle, and apparel to the same ship or vessel belonging, and shall and may be seized by any officer or officers of his Majesty's customs." (*b*)

[*807]

"That where the property in any ship, or any part thereof, belonging to any of his Majesty's subjects, shall be sold to any other of his Majesty's sub-

---

(*a*) 2 Taunt. 302.
(*b*) 4 Taunt. 652.
(*c*) 3 Camp. 240.
(*d*) By the 72nd section of the Bankrupt Act, 6 Geo. 4, c. 16, it is provided "that nothing therein contained shall invalidate or affect any transfer or assignment of any ship or vessel, or any share thereof, made as a security for any debt or debts, either by way of mortgage or assignment duly registered under the provisions of an act of Parliament made in the fourth year of his present Majesty, intituled 'An Act for the registering of Vessels.'"
(*e*) 10 East, 143.
(*a*) Sect. 2, and see the form in the act.
(*b*) Sect. 4.

jects, the same shall be transferred by bill of sale, containing a recital of the certificate of registry of such ship, or the principal contents thereof, otherwise such transfer shall not be valid or effectual for any purpose whatever, either in law or in equity; but no bill of sale shall be deemed void by reason of any error in such recital, provided the identity of the ship intended in the recital be effectually proved thereby." (*c*)

And, therefore, a certificate of registry affords conclusive proof that a person not named therein, was not at that time owner. *Marsh* v. *Robinson.* (*d*)

And in the case of *Camden* v. *Anderson*, (*e*) where two partners purchased a ship under a regular bill of sale, and were registered accordingly, and they afterwards took in two *other partners, who paid their respective shares in the ship, but there was no transfer to them under the [*808] direction of the statute, (*a*) it was held that the four partners had not an insurable interest in the freight, for as the right of freight resulted from the right of ownership, these four partners had not shewn in themselves jointly (as laid in the declaration) either a legal or equitable title in the ship.

When, therefore, the interest in the ship is claimed by a bill of sale or other writing, and possession and acts of ownership are not relied upon by the assured, he must give in evidence the proper documents required by the statute in order to support his case. (*b*)

In the case of *Senat* v. *Porter*, (*c*) where the agent or broker of the assured, having shown to the underwriter the protest of the captain, stating the circumstances of the loss of the ship insured, and demanding payment, it was held by the Court, on a motion for a new trial, that the delivery of this paper to the defendant did not entitle him to read it, as evidence of the facts contained in it; though, had the captain been called to give a different account of the loss from that contained in the protest, it might have been produced to show that he was not worthy of credit; but it could not be read on the part of the defendant to prove any fact in the case.

So also in *Wright* v. *Barnard*, (*d*) in an action on a policy on the ship, a condemnation of the vessel by a Court of Vice Admiralty abroad for insufficiency, after a survey had upon oath, was offered in evidence by the underwriters, to prove that there were defects in the ship, from which want of seaworthiness at a prior time was meant to be inferred; but Lord *Kenyon* rejected the sentence as evidence of the facts *contained in it, though he admitted it to be read, to prove the mere fact of a condemnation [*809] having taken place; and this, notwithstanding an order of the Court of Exchequer, directing that it should be admitted in evidence.

A man having purchased goods beyond sea, in order to prove his property in the cargo, in an action upon a policy of insurance, produced a bill of parcels of one Gardiner, at *Petersburgh*, with his receipt to it, and proved his hand. The defendant objected that this was no evidence against the insurers; but the Lord Chief Justice allowed it. *Russel* v. *Boheme.* (*a*)

If the policy is on freight, the assured must show either that the goods were on board, or ready to be put on board, under a contract capable of being enforced,

---

(*c*) Sect. 31. Upon the construction of this section, see Hunter v. Parker, 7 M. & W. 322.

(*d*) 4 Esp. 98.

(*e*) 5 T. R. 709.

(*a*) 26 Geo. 3, c. 60.

(*b*) See the 40th sect. of 3 & 4 Wm. 4, c. 55, and see Teed v. Martin, 4 Camp. 90, as to secondary evidence, and see Woodward v. Larking, 3 Esp. 286.

(*c*) 7 T. R. 158. The same doctrine had been previously held by Lord Kenyon in Christian v. Combe, 2 Esp. 489.

(*d*) Sittings after Mich. 1798, at Guildhall, Park Ins. 863.

(*a*) 2 Stra. 1127.

or that there was an inception of the right by means of a charter-party. And the assured cannot recover for the whole freight under even a valued policy where only part have been put on board, and no inchoate right to freight had arisen under a charter-party or other contract. (*b*)

It is, in the last place, incumbent on the plaintiff to prove that a loss has happened, and that by the very means stated in the declaration. It is absolutely necessary that this rule should be strictly adhered to; for otherwise the insurers would come into Court prepared to defend themselves against one charge, and one species of loss; and they would then be obliged to resist a demand upon a quite different ground.

This appeared clearly in the case of *Gregson* v. *Gilbert*, (*c*) and also in the case of *Kulen Kemp* v. *Vigne*, (*d*) which was an action on a policy of insurance, which came on to be tried before Mr. Justice *Buller*, who nonsuited the plaintiff. Upon a motion to set aside that nonsuit, the following report was made by the learned Judge. The insurance was upon goods on board the ship
[*810] *Emanuel*, at and from *Falmouth* to *Marseilles*, *warranted a *Danish* ship, and on the policy was this memorandum:—"The following insurance is declared to be on money expended for reclaiming the ship and cargo valued at the sum which shall be declared hereafter. The loss to be paid, in case the ship does not arrive at *Marseilles*, and without further proof of interest than this policy; warranted free from all average, and without the benefit of salvage." It appeared that the plaintiffs were proprietors of the cargo, but not of the ship. That the ship originally sailed with the cargo on board from *Riga* to *Marseilles*, and that insurance had been effected at *Bremen* upon the cargo for that voyage, in the course of which she was taken and brought into *Falmouth* by an *English* privateer. That a sentence of condemnation had been there obtained, which was afterwards reversed, upon the prize having been proved to be a neutral ship, but the expenses of procuring that reversal were ordered by the Admiralty Court to be a charge upon the cargo. The plaintiff's agents accordingly paid the sum of 1,031*l.* 14*s.* for the expenses of reclaiming the ship and cargo; and immediately procured the policy in question to be effected in *January*, 1781, according to the purport of the memorandum. In the *February* following, the ship set sail from *Falmouth*, with the original cargo on board, in the prosecution of her voyage to *Marseilles*, but, on the 26th of the same month, before her arrival there, was captured by a *Spanish* ship, and carried into *Ceuta*, in *Spain*, where she was again condemned. An appeal was brought in the Superior Court at *Madrid*, which promising to be of long continuance, the cargo, which was of a perishable nature, was ordered to be sold, and the proceeds to be brought into Court to wait the event of the suit. In *May*, 1783, the vessel was restored by sentence of the Court, and the surplus of the proceeds which arose from the sale of the cargo was paid to the owners, deducting the expenses incurred in *Spain* in prosecuting the appeal. After all the charges paid, there only remained twenty-six rix dollars. As soon as the ship was liberated, she sailed from
[*811] *Ceuta* to *Malaga*, in order to refit, and having there made *the necessary repairs, set sail for *Bremen*, and in that voyage was lost. The insurance made upon the cargo at *Bremen* had been paid. The declaration averred that, "whilst the ship was proceeding in her said voyage from *Falmouth* to *Marseilles*, and before she could arrive at *Marseilles*, she was captured by the *Spaniards*, and thereby the said ship, and also the goods

(*b*) See Devaux v. I'Anson, 7 Scott, 507; 5 B. N. C. 519, and *ante*, p. 173.
(*c*) B. B. East. T. 23 Geo. 3. Park Ins. 138, *ante*, p. 272.
(*d*) 1 T. R. 304.

and merchandises on board her, were totally lost to the plaintiffs." At the trial, it was objected, on the part of the defendant, 1st, that this was not an insurable interest; and 2ndly, that the plaintiffs could not recover upon the policy in this form of declaring, for they stated the loss to have happened by capture; whereas, though the vessel was captured, yet, having been afterwards restored, she might have reached her destined port, notwithstanding the capture, in which case the underwriters would have been discharged by the terms of the memorandum. I was of that opinion, and upon the last ground I nonsuited the plaintiffs."

This case was very fully argued both upon the merits and the formal objection, after which all the Judges spoke upon the question.

Lord *Mansfield*.—"A loss accrued upon the cargo in the voyage, the underwriter is sued, and the loss is averred in the declaration to be by capture. The fact of the case is, that the ship was taken by a *Spanish* privateer, but was afterwards restored, and in a condition to pursue the voyage, and was afterwards lost in another voyage."

Mr. Justice *Willes*.—"Upon this case it is clear that the plaintiffs cannot recover. In the first place there was certainly a deviation, for the ship set sail for *Malaga*, instead of proceeding to *Marseilles*. Secondly, the plaintiff has declared for a loss by capture; but after the capture, the policy might still have been complied with by the ship's going to *Marseilles*, and therefore the loss cannot be said to have happened by that circumstance."

But where, in the case of *Cary* v. *Kiny*, (*a*) a loss is averred [*812] *to be by perils of the sea, and some of the goods insured are spoiled and others saved, it is allowable to give the expense of the salvage in evidence upon such an averment, because it is a consequence of the accident laid in the declaration.

In an action on a policy of insurance for insuring goods on board the ship *A.*, the plaintiff declares that the ship sprung a leak, and sunk in the river, whereby the goods were spoiled. The evidence was, that many of the goods were spoiled, but some were saved; and the question was,—Whether the plaintiff might give in evidence the expense of salvage, that not being particularly laid as a breach of the policy in the declaration?

Lord *Hardwicke*, C. J.—"I think they may give it in evidence, for the insurance is against all accidents. The accident laid in this declaration is, that the ship sunk in the river: it goes on and says that, by reason thereof, the goods were spoiled; that is the only special damage laid, yet it is but the common case of a declaration that lays special damage, where the plaintiff may give evidence of any damage that is within his cause of action as laid. And though it was objected that such a breach of the policy should be laid as the insurer may have notice to defend it, it is so in this case, for they have laid the accident, which is sufficient notice because it must necessarily follow that some damage did happen.

(*a*) Cas. temp. Hard. B. B. 304. But salvage payable under a decree of a Court of Admiralty must be proved by evidence of the judgment of the Court. Thelluson v. Sheddon, 2 N. R. 229.

ADDENDA.

[*821*] *Case of REDMOND v. SMITH and Another. (*a*)

THIS was an action of assumpsit on a policy of insurance. The declaration stated that the plaintiff, by certain persons called or known by the name, style, and firm of H. & J. Johnston & Co., the plaintiff's agents in that behalf, theretofore, to wit, on the 2nd of July, 1842, caused to be made a certain policy of insurance purporting thereby and containing therein that the said H. & J. Johnston & Co., as well in their own name as for and in the name or names of all and every person or persons to whom the same did, might, or should appertain, in part or in all, did make assurance and cause themselves and them and every of them to be assured with and by the defendants, lost or not lost, for the space of twelve calendar months, commencing on the 1st of July, 1842, and ending on the 30th of June, 1843, both days inclusive, in port and at sea, in docks and on ways, at all times, in all places, and in all services, warranted to be employed in the coasting trade of the united kingdom, with leave to call at any ports or places for any purposes, and to tow vessels, upon the body, tackle, apparel, ordnance, munition, artillery, boat, and other furniture of and in the good ship or vessel called the *Brigand* (steamer,) whereof was master for that present voyage ——, or whosoever should go for master in the said ship, or by whatsoever other name or names the same ship, or the master thereof, was or should be named or called, beginning the adventure upon the said ship, body, tackle, apparel, ordnance, munition, artillery, boat, and other furniture of and in the said good ship or vessel as above; and that it should be lawful for the said ship, &c. to proceed and sail to and touch and stay at any ports or places whatsoever in the course of the said voyage for all necessary purposes, without prejudice to that assurance; the said ship, &c., for so much as concerned *the assured, by agreement made between the assured and the said defendants in that policy, were and should be rated and valued in manner following, that is to say, hull and materials should be valued at 7500*l.*, machinery should be valued at 7500*l.*; to pay the average on each as if separately insured; touching the adventures and perils which the defendants were contented to bear and did take upon them in that voyage, they were, of the seas, men of war, fire, enemies, pirates, rovers, thieves, jettisons, letters of mart and countermart, surprisals, takings at sea, arrests, restraints, and detainments of all king's, princes, and people of what nation, condition, or quality soever, barratry of the master and mariners, and of all other perils, losses, misfortunes, that had or should come to the hurt, detriment, or damage of the said ship, &c., or any part thereof; and that, in case of any loss or misfortune, it should be lawful to the assured, their factors, servants, and assigns, to sue, labour, and travail for, in, and about the defence, safe-guard, and recovery of the said ship, &c., or any part thereof, without prejudice to that assurance, to the charges whereof the said defendants would

[*822*]

(*a*) 8 Scott's N. R. 250.

contribute according to the rate and quantity of the sum therein assured; and the defendants were contented and did thereby promise and bind themselves to the assured, their executors, administrators, and assigns, for the true performance of the premises, confessing themselves paid the consideration due unto them for that assurance by the assured at and after the rate of 5*l.* 5*s.* per cent., to return 8*s.* 4*d.* per cent. for each uncommenced month, and 4*s.* per cent. for every fifteen days the vessel might be laid up unemployed, notice being given; the risk of fire to be borne during such time by the underwriters; the said ship was warranted free of average under 3*l.* per cent., unless general or the ship should be stranded: and the defendants by the said policy undertook the said insurance for the sum of 3000*l.* sterling: and by a certain memorandum written in the margin of the said policy, it was declared that any claim under the said policy, would be paid in London within ten days after adjustment. [*823*]
*Averment that the said policy of insurance was so made by the said H. & J. Johnston & Co. as aforesaid, as the agents for him the plaintiff and on his account, and for his the plaintiff's use and benefit; and that the said H. & J. Johnston & Co. did receive the order for and effect the said policy of insurance as such agents as aforesaid, of all which premises the defendants afterwards, to wit, on the said 2nd of *July*, 1842, had notice; and thereupon, on the day and year last aforesaid, in consideration that the plaintiff, at the request of the defendants, had then paid to the defendants a certain sum of money, to wit, the sum of 157*l.* 10*s.*, as a premium or reward for the insurance of 3000*l.* of and upon the premises in the said policy of insurance mentioned, and had then promised the defendants to perform and fulfil all things in the said policy of insurance contained on the part and behalf of the insured to be performed and fulfilled, the defendants then promised the plaintiff that they the defendants would become and be insurers to the plaintiff of the sum of 3000*l.* upon the said premises in the said policy of insurance mentioned, and would perform and fulfil all things in the said policy of insurance mentioned on their part and behalf as such insurers of the said sum of 3000*l.* to be performed, fulfilled, and observed: averment that the defendants then became and were insurers to the plaintiff, and then duly subscribed the said policy of insurance as such insurers of the said sum of 3000*l.* sterling upon the premises in the said policy in that behalf mentioned; that he the plaintiff, at the time of the making of the said policy of insurance was, from thence continually afterwards until and at the time of the loss thereinafter mentioned, interested in the said ship in the said policy of insurance mentioned to a large value and amount, to wit, to the value and amount of all the moneys by him ever insured or caused to be insured thereon; that theretofore, and after the making of the said insurance, and whilst the said ship or vessel was employed in the coasting trade of the United Kingdom, and after the said 1st of *July*, 1842, in the said policy of insurance *mentioned, and before the 30th of *June*, 1843, in the said policy of insurance also mentioned, to wit, on [*824*] the 10th of *October*, 1842, the said ship or vessel departed and set sail from the port of *Liverpool* on a voyage to *London;* that the said ship in the said policy of insurance mentioned, whilst she was proceeding on her said voyage, and before her arrival at *London* aforesaid, and whilst she was so employed in the coasting trade of the United Kingdom as aforesaid, to wit, on the 12th of *October*, 1842, upon the high seas, struck against certain rocks, and did thereby then and there founder and sink in the seas aforesaid, and the same ship or vessel, with her tackle, apparel, ordnance, munition, artillery, machinery, and other furniture, were then totally lost, destroyed, and sunk in the sea aforesaid, of all which said several premises the defendants afterwards, to wit, on the day and year last aforesaid, had notice, and were then requested by

the plaintiff to pay him the said sum of 3000*l.* so by him insured as aforesaid, and which said sum of 3000*l.* they the defendants then ought to have paid according to the form and effect of the said policy of insurance, and their said promise and undertaking so by them made as aforesaid. There was also a count for 3000*l.* money had and received by the defendants for the use of the plaintiff, and the like sum for money found to be due from the defendants to the plaintiff on an account stated between them.

The defendants pleaded—secondly, as to the first count, that the said policy of insurance was not made by the said H. & J. Johnston & Co. as agents for the plaintiff, or on his account, or for his the plaintiff's use and benefit; and that the said H. & J. Johnston & Co. did not receive the order for or effect the said policy of insurance as such agents as aforesaid, as in the said first count was alleged.

Sixthly, as to the first count, that the said policy of assurance in that count mentioned was made, and that the said loss of the said ship or vessel happened, after the passing of a certain act of Parliament made and passed in the session [*825*] of Parliament held in the 5th and 6th years of the reign of his *late Majesty, King William the 4th, intituled, "An Act to amend and consolidate the laws relating to merchant seamen of the United Kingdom, and for forming and maintaining a register of all the men engaged in that service;" that the said ship or vessel was, at the several times of sailing on the said voyage, and of the said loss in the declaration mentioned, respectively, a *British* registered ship, of the burden of eighty tons and upwards, and that the crew of the said vessel then consisted of divers, to wit, twenty seamen, and twenty other persons, (not being apprentices) and of one master, to wit, one Robert Morris Hunt; that there was not, at the time of the sailing of the said ship or vessel on the said voyage in the declaration mentioned, or at any other time before or after, any agreement in writing with the said master and the said seamen and other persons, or any or either of them, signed by the said master and the said seamen and other persons, or any or either of them, specifying what monthly or other wages each of such seamen and other persons, being part of the said crew, or any or either of them, was to be paid, the capacity in which he was to act, or the nature of the voyage in which the said ship was intended to be employed; contrary to the statute in that behalf; wherefore the defendants said that the said voyage was wholly illegal: verification.

The plaintiff demurred specially to the second plea, assigning for cause that the said second plea amounted to the plea of *non assumpsit;* that the matters of fact therein traversed were included in and might be given in evidence under the issue joined on *non assumpsit;* that the pleading in the manner as pleaded by the defendants in the said second plea tended to unnecessary prolixity and length; that the second plea contained a negative pregnant, inasmuch as it was pregnant with doubt whether the defendants by their said second plea meant to say that the policy was not made by H. & J. Johnston & Co. as the agents for the plaintiff, or on his account, or for his the plaintiff's use and benefit; [*826*] that the plea was multifarious and double, and traversed several *matters of fact; and that it was in other respects informal, inartificial, uncertain, and insufficient, &c.

The plaintiff also demurred generally to the sixth plea. The defendant joined in demurrer. (*a*)

(*a*) The matters intended to be argued on the demurrer to the sixth plea were, that the plea was defective in substance, inasmuch as it alleged no facts which would constitute such

TINDAL, C. J.—The defendants in this case have pleaded two pleas to which the plaintiff has demurred, viz: the second and the sixth. The second plea puts in issue the allegation in the declaration "that the said policy of insurance was so made by the said H. & J. Johnston & Co. as the agents for him the plaintiff and on his account, and for his the plaintiff's use and benefit, and that the said H. & J. Johnston & Co. did receive the order for and effect the said policy of insurance as such agents as aforesaid." The plaintiff has demurred specially to this plea, assigning, among other causes, that it amounts to the plea of *non assumpsit*, and that the matters of fact therein traversed are included in and may be given in evidence under the issue joined on *non assumpsit;* and such in point of law is, I think, the effect of this traverse. No doubt the plea of *non assumpsit* puts in issue, not only the promise alleged in the declaration, but also the consideration for such promise. Let us see, then, what is the consideration here, and whether *non assumpsit* does not put in issue virtually the same facts that are placed specially upon the record by the second plea. The declaration alleges that the plaintiff, "by certain persons called or known by the name, style, and firm of H. & J. Johnston & Co., the plaintiff's agents in that behalf, caused to be made a certain policy of *insurance;" and "that the said policy of insurance was so made by the said [*827*] H. & J. Johnston & Co. as the agents for him the plaintiff and on his account, and for his the plaintiff's use and benefit, and that the said H. & J. Johnston & Co. did receive the order for and effect the said policy of insurance as such agents as aforesaid." It appears on the face of the declaration, therefore, that the policy was effected in the name of H. & J. Johnston & Co. as agents for the plaintiff, and, as alleged on the policy, as agents for the party interested: and the consideration is thus alleged:—"In consideration that the plaintiff, at the request of the defendants, had then paid to the defendants a certain sum of money, to wit, the sum of 157*l.* 10*s.*, as a premium or reward for the insurance of 3000*l.* of and upon the premises in the said policy of insurance mentioned, and had then promised the defendants to perform and fulfil all things in the said policy of insurance contained on the part and behalf of the insured to be performed and fulfilled, the defendants then promised the plaintiff that they the defendants would become and be insurers to the plaintiff of the sum of 3000*l.* upon the said premises in the said policy of insurance mentioned, and would perform and fulfil all things in the said policy of insurance mentioned on their part and behalf as such insurers of the said sum of 3000*l.* to be performed, fulfilled, and observed." Under *non assumpsit* it would be incumbent on the plaintiff to produce the policy described in the declaration, and to prove that H. & J. Johnston & Co. made the assurance as his agents. Therefore, it seems to me that precisely the same evidence must be given under *non assumpsit* as would be requisite to sustain the second plea. And, when it is said that by the form of this traverse it would be necessary for the plaintiff to shew that H. & J. Johnston & Co. were his agents for that purpose at the very time of effecting the insurance, whereas, if it went to the jury upon *non assumpsit* only, a subsequent acknowledgment and ratification would suffice; I must say I am not prepared to admit any such distinction. If a subsequent

---

illegality in the voyage as to render the policy void, or which afforded any answer to the action; that the plea was further defective in substance, inasmuch as by the 5 & 6 Wm. 4, c. 19, the agreement required to be entered into with seamen before they were carried to sea on any voyage, was to be entered into with them by the master of any ship or vessel, and the penalty for default was inflicted on the master; and the owner of any ship or vessel, not having knowledge of the master's default, could not be prejudiced, so as to prevent his recovering on a policy effected on such ship.

[*828*] ratification would be enough in *the one case, I do not see why it should not in the other. On the part of the plaintiff was cited the case of *Sutherland* v. *Pratt*, (11 M. & W. 296) where a plea to a declaration in assumpsit on a policy of insurance, that the policy was not caused to be made by or on behalf of the plaintiff was held bad on special demurrer, as amounting to *non assumpsit*. I am unable to distinguish that case upon any solid and substantial ground from the present. As far, therefore, as the second plea is concerned, the demurrer must prevail. By the sixth plea the defendants seek to set up as an answer to the action, that the voyage in respect of which the policy declared upon was made was an illegal voyage, by reason of the non-compliance with the directions of the statute 5 & 6 Wm. 4, c. 19. There can be no doubt but that a policy effected on a ship upon the prosecution of an illegal voyage is void, and cannot be enforced in a Court of Law. It would be singular, indeed, if the main contract should be void and the collateral contract valid. It may, therefore, be laid down as a general rule, that, where the voyage itself is illegal, an assurance for the voyage is also illegal. There are many cases where that has been held to be undoubted law. Thus, in the time of the last war, policies effected on vessels sailing in contravention of the Convoy Acts, 38 Geo. 3, c. 76, and 43 Geo. 3, c. 57, where held void. So, where the voyage was in breach of the Navigation Act, 6 Geo. 4, c. 109, or of the acts regulating the *East India Company* or the *South Sea Company*—acts which had in view the general policy of the realm, and the security and encouragement of navigation. But it appears to me that the provisions of the statute 5 & 6 Wm. 4, c. 19, were framed for a collateral purpose only: it was intended to give to seamen in the merchant-service a readier mode of ascertaining and enforcing their rights, and to prevent them from having imposed upon them contracts into which they had never in fact entered; and therefore it enacts, in s. 1, "that it shall not be lawful for any master of any ship or vessel belong-

[*829*] ing to any subject of his Majesty of this *United Kingdom trading to parts beyond the seas, or of any *British* registered ship of the burthen of eighty tons or upwards employed in any of the fisheries of the United Kingdom, or in trading coastwise or otherwise, to carry to sea on any voyage, either from this kingdom or from any other place, any seaman or other person as one of his crew or complement, (apprentices excepted) without first entering into an agreement in writing with every such seaman, specifying what monthly or other wages each such seaman is to be paid, the capacity in which he is to act, and the nature of the voyage in which the ship is intended to be employed, so that the seaman may have some means of judging of the probable period for which he is likely to be engaged; and the said agreement shall contain the day of the month and year in which the same shall be made, and shall be signed by the master in the first instance, and by the seamen respectively at the port or place at which such seamen shall be respectively shipped: and the master shall cause the same to be, by or in the presence of the party who is to attest their respective signatures thereto, truly and distinctly read over to every such seaman before he shall be required to sign the same, in order that he may be enabled to understand the purport and meaning of the engagement he enters into and the terms to which he is bound." And then the act goes on, in section 4, to provide, that, if any master of any such ship as aforesaid shall carry out to sea any seaman (apprentices excepted) without having first entered into such agreement as is thereby required, he shall for every such offence forfeit and pay the sum of 10*l.* for or in respect of each and every such seaman he shall so carry out contrary to this act; and, if any master shall neglect to cause the agreement to be distinctly read over to each such seaman, as by this act he is enjoined, he shall for every such neglect forfeit and pay the

sum of 5*l.*; and, if any master shall neglect to deposit with the collector or comptroller of the customs a copy of the agreement thereby required to be made and deposited as aforesaid, [s. 3] or shall wilfully deposit a false copy of any *such agreement, he shall for every such neglect or offence forfeit and pay the sum of 50*l.*" The non-compliance with these [*830*] directions of the statute, though it may furnish good ground of action against the master, does not render the voyage illegal. It has been insisted that a non-compliance with the statute at all events amounts to unseaworthiness. The cases, however, that were cited all shew, that, to constitute this sort of unseaworthiness, it must appear that there was a crew insufficient in point of number, or a want of capacity or intelligence in the master or other officers. Here there is nothing of the kind shewn. I therefore think the sixth plea is also bad; and consequently that upon both the demurrers there must be judgment for the plaintiff.

INDEX

TO THE

PRINCIPAL MATTERS.

Pages referred to are those between brackets, thus [ ]

AVERAGE, GENERAL.

1. General average is the general contribution that is to be made by all parties towards a loss sustained by some for the benefit of all, 492, 495

2. The principle of this general contribution is derived from the ancient law of Rhodes, being adopted into the Digest, with an express recognition of its true origin, 492

3. In a marine sense, "contribution" and "average" are synonymous terms, 497

4. The rule of the Rhodian law is this:—"If goods are thrown overboard, in order to lighten a ship, the loss incurred for the sake of all shall be made good by the contribution of all, 497

5. In case of necessity, for saving the lives of the passengers in a ship, it is lawful for any one passenger to throw the goods of another overboard; and where the danger accrued only by the act of God, as by tempest, every man ought to bear his loss for the safeguard and life of a man, 498

6. In a general average, one thing is certainly necessary, viz: that the ship be in distress, and that sacrificing a part be necessary to preserve the rest, 499

7. Previous deliberation is not an essential ingredient in determining a casting overboard, if the master and crew agree that it is necessary: too much care and selection of goods very justly would excite a suspicion of fraud, 499

8. If the ship ride out the storm, it is the duty of the master, if she arrive at her port of destination, or at any other port, to draw up an account of the jettison, and verify the same by the oath of himself or of some of his crew, as soon as possible, that there be no opportunity to purloin goods, and then pretend they were cast over in the hour of danger, 500

9. If the jettison does not save the ship, but she perish in the storm, the goods saved are not to contribute to the loss of the goods cast overboard, because the object of the jettison was not attained, 500

10. But if the ship be saved, and pursue her voyage, and afterwards be lost, the goods saved from the subsequent loss shall contribute to the loss of the goods cast over on the former occasion, 500

11. If in the act of jettison, or in consequence of it, other goods are broken, damaged, or destroyed, the value of these must be included in the general contribution, and damage done to the ship by cutting holes to effect jettison, or to let out the water, 500

12. If the ship be obliged to take refuge in a port to which she was not destined, and which she cannot enter without lightening the ship by taking out part of the cargo, and the part is lost in the craft to the shore, this loss, which was occasioned by the removal for a general benefit, must be repaid by a general contribution, 501

13. All loss which arises in consequence of extraordinary sacrifices, or expenses incurred for the preservation of the ship and cargo come within the description of general average, 501

14. The expense of repairing a ship injured by resisting a privateer, curing the wounds of the sailors, and the ammunition expended, are not the subject of a general average, 502

15. A master who has cut his mast, parted with his cable, or any other part of the ship, in order to save the ship, he is entitled to compensation by a general average, 503

16. But where a vessel carried a press of sail, to avoid a privateer, and was damaged, this is not a general average loss, 503

17. Goods laden on deck, unless sanctioned by the usage of trade, though they

must contribute to a loss, are not themselves the subject of a general average, 504

18. But the owner of a cargo of timber laden on deck, pursuant to the usage of the trade, is entitled to a contribution, in the nature of general average, for a loss by jettison, 504

19. And where, in an action by a shipowner against the underwriter on "the ship," the declaration stated that certain pigs were thrown overboard, for the safety of the ship, and the plaintiff was afterwards forced to contribute to the general average. Plea, that the pigs were laden on deck, by reason whereof the defendants were not liable to contribute to the average. Held bad, for not showing that the lading was improper under the circumstances, 505

20. Boats ought to be lashed on deck, but if lashed to the quarters they are entitled to contribution, 513

21. In whaling voyages it is the practice to adjust, on the principles of general average, the loss of oil, thrown overboard from the deck, where it is carried a short time before it can be properly and safely stowed in the hold, 513

22. If a ship be carried by force into a port, the charges of reclaiming her, and the extra wages and expenses during the detention, are the subject of a general average, 515

23. Extraordinary wages and provisions expended during the time a ship goes into a port to repair, are not the subject of a general average, unless in the case of urgent necessity, 516

24. Where a ship is obliged to go into a port for the benefit of the whole concern, the charges of unloading and reloading the cargo, and the wages and provisions of the workmen hired for the repairs, are general average, 517

25. The wages and provisions, and the expenses of repairs, where a ship goes into port in order to repair damage by a tempest, are not the subject of a general average, 519

26. General principle to be derived from these decisions, 520

27. If the master cannot borrow money to repair his ship on the security of ship or cargo, he may sell part of the cargo to repair her, so as to enable her to take the remainder of the cargo to its port of destination; and the money so obtained will make the subject of a general average, 521

28. Goods are to be contribute according to their value, 522

29. Wearing apparel and jewels belonging to the person do not contribute. 522

30. Seamen's wages do not contribute, 522

31. In what proportions ship, freight, and cargo, shall contribute, 523

32. The value at which the goods cast overboard are to be estimated, and for what value those saved are to contribute, 524

33. The time when the contribution is to be made, 525

34. The place at which the average is to be adjusted, 527

35. The adjustment is to be made according to the law of that place, 527

ARRESTS, RESTRAINTS, DETENTION OF PRINCES, &c.

See Total Losses and Abandonment.

1. Malyne says, "that the assurers are liable for all losses by arrests, detentions, &c., happening both in time of war and peace, committed by the public authority of princes, &c., 305

See Roccus's Opinion, *ib.*

2. Lord Mansfield said, in the case of Goss v. Withers, that the assured may abandon in case merely of an arrest on an embargo, by a prince not an enemy; and consequently such an arrest is a loss within the meaning of the word "detention," 296, 305

3. The term "people," in the clause, means the supreme power—the power of the country, whatever it may be, 306

4. What is an embargo? An embargo is an arrest laid on ships or merchandise, by public authoriry, or a prohibition of state, commonly issued to prevent foreign ships from putting to sea in time of war, and sometimes also to exclude them from entering our ports, 306

5. This term has also a more extensive signification, where ships are detained by a prince to serve him in an expedition, and for this end have their ladings taken out, without any regard to the government they obey, 307

6. An embargo may be laid on shipping in the ports of Great Britain by royal proclamation, in time of war, because a proclamation is founded on a prior prerogative, viz: that the king may prohibit any of his subjects from leaving the realm, 307

7. But in times of peace the power of the King of Great Britain to lay such restraints is doubtful, 307

8. Where a neutral vessel was seized by a foreign power, and carried into port, to be searched for enemy's property, all charges arising out of the improper detention must be borne by the underwriters, 308

9. A neutral ship is insured at and from an enemy's port, and an embargo is there laid on by the enemy. The assured may abandon, and recover a total loss, 310

10. A British merchant is not answerable for the damage which may happen to a foreign ship by reason of an embargo laid on by the British Government, 312

11. Where the assured is a subject of this country, he may recover against a British underwriter for a loss arising out of a detention by the British Government, 313

12. Every man is a party to the public acts of his own Government, and cannot make the consequences of an act of his own state the foundation of a claim of indemnity upon a British subject in a British court of justice, any more than he could if such act had been done immediately and individually by such foreign subject himself, 313

13. Where a consignor has made a policy, and his conduct or that of his nation has deprived him of the right of enforcing it, for his own benefit, the consignee cannot apply it to his own interest as if it had been made on his account, 319

14. An alien enemy, with respect to his birth, domiciled in this country may, in the time of war, protect by insurance, either for his own benefit or his correspondent's, a shipment licensed by the Crown to the enemy's country, 320

15. A plaintiff, an alien in respect to his birth, may, if domiciled here, sue in our Courts. The legal result being that not only the plaintiff, the person licensed may sue, but that the commerce itself is to be regarded as legalized for all purposes of its due and effectual protection, 320

See the subject of "LICENSES," Part 2, Sect. 2.

16. By the law of nations notification of a blockade is notice to all the subjects of the nation to which the notification has been made. But, in cases of insurance, knowledge of the fact must be proved in the assured, 315

17. In a policy of insurance from Liverpool to a blockaded port, the ship sailed on the voyage before the blockade was notified in this country, but afterwards put into another port in this kingdom after notification of the blockade in the *London Gazette*, and it might be known there: the jury found the captain did not know of the blockade. Held that the knowledge of the captain was not to be presumed on the principle that notice to a state is notice to all its subjects, but it was a question of fact properly left to the jury, 315

THE ASSURED.

1. Who may by law be the assured in a marine policy of assurance, 1

2. Exception in the case of alien enemies, 2

3. The descriptions of the persons enabled to sue on the policy, by 28 Geo. 3, c. 56, 3

4. Decisions on this act, 4

5. Any of his Majesty's subjects may make an insurance alleging the interest to be in his Majesty, and his Majesty may adopt and ratify it, 7

THE ASSURERS.

1. By the common law any individual or number of individuals acting in partnership might be assurers, 530

2. But this giving rise to a set of adventurers who got the premiums and could not pay the losses, the law was altered by founding two chartered companies, giving them a monopoly; and prohibiting persons in partnership being assurers, 530

3. In more modern times this has been altered; and at this day any persons, whether in partnership or not, may be assurers, 531

4. But the two chartered companies retain their charters. See an account of them, 531

5. Of private assurers the most important are the underwriters who are members of Lloyd's coffee-house, 532

BARRATRY.

1. Barratry is defined by Postlethwaite in his Dict. to be "when the master of a ship, or the mariners, cheat the owners or assurers, whether by running away with the ship, sinking her, deserting her, or embezzling the cargo. And in vol. i, p. 136, title "Assurance," he says, "one species of barratry in a marine sense, is, when the master of a ship defrauds the owners or assurers of her, by taking her in a different course to their orders," 322

2. Lord Mansfield, in Vallejo v. Wheeler, Cowp. p. 153, says, "I take the word to have been introduced by the Italians, the great traders of the modern world." In the Italian Dict. the word "barratrare" means to cheat, 324, 334

3. Whether the loss takes place during the fraudulent voyage or after is immaterial, because the voyage is equally altered, 325

4. Where a ship and her cargo were barratrously taken out of her course by the master and mariners, and part of the cargo sold, and the remainder sent home in another vessel, held that this was a total loss of the cargo the moment the act of "barratry" was committed, 326

5. The loss must take place during the voyage, and within the time limited by the policy, 328

6. Where the owner of a ship, by a contract, placed the entire vessel for a time under the sole control of the freighter, an act done by the general owner, or with his consent, in fraud of the freighter, is an act of "barratry," 329

7. Mr. J. Willes's definition of "barratry," 329

8. If the master deviate from the voyage on a private speculation of his own it constitutes "barratry," 325, 330

9. If a master, contrary to his instructions, cruise for and take a prize, it is "barratry," 331

10. The master of an American slave ship sails to an enemy's settlement on the coast for the purpose of trading to more advantage than at a British settlement without having instructions to go there; his ship was seized by a British frigate: this trading was held to be "barratry," 331

11. The master must do nothing contrary to the laws of his country, whether with or without a view to the advantages of his owners, 335

12. In the sense in which "barratry" is used, as applied to subjects of British marine insurances, it is considered precisely tantamount to fraud, 334

13. If the master of a ship sail out of port without paying port dues, whereby the goods are forfeited, lost or spoiled, this is "barratry," 335

14. If the master sail out of port without leave in breach of an embargo, in consequence of which the owners afterwards sustain a loss, in respect of sailors' wages and provisions, by the detention of the ship, this is "barratry," 336

15. If the conduct of the master is criminal with respect to the state it is "barratry," although likely in his opinion to advance his owner's interest, 337

16. A deviation by the master through a mistake as to the meaning of his instructions, or a misapprehension of the best mode of carrying them into effect, will not constitute "barratry," 338

17. The freighter for the voyage is owner of the ship, *pro hâc vice*, and "barratry" cannot be committed with his consent, 339

18. But an act of the captain with the consent of the owner of the ship, though without the privity of the owners of the goods, does not constitute "barratry," 340

19. Barratry cannot be committed against any but the owners of the ship, 341

20. If an owner be likewise master he cannot commit "barratry," 242

21. The mortgagor of a ship is sufficiently the owner to disable him from committing "barratry" if he also be master, 442

22. And the Court of Chancery, in a case in which the owner and master after mortgaging his ship had committed "barratry," and when the mortgagee brought an action against the underwriter to recover damages for the loss he had sustained by this act of "barratry," still considering the mortgagor the owner, granted an injunction, 342

23. A loss is well alleged to have happened by the perils of the sea, if supported by proof of the ship being wrecked, although this may have been occasioned by the "barratry" of the master and mariners, 344

24. A loss is well alleged to have happened by "barratry" though it be proved to have taken place by the joint act of the enemy, aided by the crew, 344

25. The laws of this country, and the ordinances of some foreign nations, for the punishment of those who have been found guilty of the more heinous acts of "barratry," 345

26. And of piracy, 347

BROKER.

1. The insurance broker goes between the assured and the underwriter, 533

2. He is answerable in an action by his employer (the merchant) if he accepts a retainer, and fails in performing his duty, 533, 536

3. The broker is agent both to the assured and the underwriter, 534

4. He sometimes acts under a *del credere* commission, 534

5. As the brokers transact the principal part of the business for the merchants, the law gives them a lien upon the policy, 535

6. Although the broker has a lien, he may be served with a "*subpœna duces tecum*," on a trial between the assured and the underwriter, to produce the policy, for he does not thereby lose his lien, 536

7. There are three cases in which a merchant has a right to expect that a broker will obey an order to insure, 537

8. If a broker in making a policy, omits any circumstance, which will be a defence in an action by the assured against the underwriter, he is liable in an action to the amount of the assured's loss, 538

9. In an action against a broker for negligence, though the evidence of brokers and underwriters is not admissible upon a matter of fact upon which the jury are to give their verdict, yet they may be called to shew whether other persons of skill and experience in the same profession, would or would not have come to the same conclusion as the defendant, 539

10. In an action against an agent for a breach of undertaking according to special instructions, the declaration alleged the duty of the defendant to be, to make the insurance according to the terms, or give notice to the plaintiff of their inability to do so. Held, that the implied duty of the defendant would support the express promise alleged in the declaration, 541

11. And where in an action against a broker for not making an insurance according to his undertaking, and the plaintiff recovered a verdict, on a motion for an arrest of judgment, on the ground that the duty alleged in the declaration to make an insurance was larger than the duty of the defendant, who only ought to have used reasonable care

and diligence to perform what he had undertaken. Held, that the action was founded on an express contract, and the breach not larger than the terms of the contract, and the allegation that the defendant, to perform his promise "wrongfully and in breach of his duty and retainer, and of his acceptance thereof, wholly neglected and refused," was a legal charge on the face of the declaration, and sufficient to call on the defendant for an answer, 545

12. If in an action against an agent, the neglect complained of, be the non-communication of a material fact to the underwriters by which the policy was voided, the agent may by way of defence make it appear that the fact, if communicated, would have made it impossible to get the insurance made at the premium limited by his instructions, 545

13. Settlement between the broker, the underwriter, and the assured, 546

14. The receipt of the premium on the face of the policy, is a bar to an action by the underwriter against the assured, except in the case of fraud, 547

15. But between the underwriter and the broker the receipt is no bar, 547

16. In an action by the assured against the underwriter, the latter cannot set off the premium though he has not been paid by the broker, 549

17. In an action by the assignees of an underwriter against a broker for premium, the broker may set off losses which have happened before the bankruptcy, for which premiums the underwriter had debited the broker, 552

18. See the earlier cases relating to the effect of the death or bankruptcy of the underwriters had on the running accounts between them and the broker, 553, 556

19. The usage at Lloyd's of passing the accounts between the broker, the underwriter, and the assured, 556, 567

BOTTOMRY, AND RESPONDENTIA INTEREST.

1. Must be specially mentioned in the policy as such, 15

2. But an interest in expenses, incurred by the captain for the use of the ship, for which he charged respondentia interest, was held to be protected by a policy on "goods, specie, and effects" of the captain, on the grounds solely of the usage of the Indian trade, 18

CAPTURE.

1. When a British subject insures against capture, the law infers that the contract contains an exception of captures made by the government of his own country, 287

2. All insurances of enemies' property, from the effects of the acts of the government of the country of the underwriters, are illegal at the common law, and cannot be enforced, 287

3. A ship insured being taken, the assured may demand as for a total loss, and abandon to the underwriter, 287

4. By the common law the thing taken from the owner in war is gone, and the property so taken in war belongs to the captors, 290

5. On a policy, "interest or no interest," a recapture, after being in an enemy's port will not avail the assurer, 291

6. It is immaterial, as between the assured and the assurer, whether the property by capture be or be not transferred to the enemy by the law of nations, 293

7. If the ship taken by an enemy escapes, or is retaken, his property in the ship is revested, 294

8. The practice of the Court of Admiralty in England before any act of Parliament commanded restitution, or fixed the rate of salvage, 295

9. Whatever rule ought to be adopted in favor of the owner, it can in no way effect the case between the assured and the assurer, 295

10. The ship is lost by capture, though she be never condemned at all nor carried into any port of the enemy, the assurer must pay the value, 295

11. The assurer runs the risk of the assured, and undertakes to indemnify, he must therefore bear the loss actually sustained, and can be liable to no more, 296

12. There is no book, ancient or modern which does not say, "that in case of the ship being taken, the assured may demand as for a total loss and abandon. And what proves the proposition most strongly is, that by the general law he may abandon in the case merely of an arrest, on an embargo, by a prince not an enemy, 296

13. The chance of restitution does not suspend the demand for a total loss upon the assurer, but justice is done by putting him in the place of the assured in case of recapture.

14. In the Treatise called "Le Guidon," where, after mentioning the right to abandon upon a capture, he adds, "or any other such disturbance as defeats the voyage, or makes it not worth while, or worth the freight to pursue it," 297

15. Where a neutral ship was unjustly seized as a prize, and being libelled in the Court of Admiralty by a decree, against which an appeal might have been made; but the owners dreading the hazard, the costs and the delay, entered into a compromise with the captors that they should for a sum of money suffer a reversal of the sentence; held that the

assurers were liable to pay the money agreed on, and paid to the captors, 298

16. It is unlawful to ransom any British ship taken by the enemy, 300

17. The sentence of a French consul in a neutral country is contrary to the law of nations, and void, 301

18. What is a proper averment of the loss by capture, and when it can be rightly made? 302

DEVIATION.—*See* SHIP.

FIRE.

1. "Fire" is expressly insured against by the underwriters in the policy, 278

2. And where the rigging, &c. of a ship were put on shore in the usual course of the voyage during a repair, and were burnt by accident, the underwriters were held liable, 278

3. And where a ship was voluntarily burnt to prevent her falling into the hands of the enemy: this was held to be a loss by "fire" within the terms of the policy, 282

4. And where a fire was lighted in a ship and by negligence set her on fire, this was held to be a loss by "fire" within the terms of the policy, 282

5. And where an insurance on "ship and furniture," provisions which had been sent out for the use of the ship, were taken out of the vessel while refitting and put in a warehouse in the regular course of the trade, and were burnt by accident, it was held, that as the underwriters had insured against "fire" by the policy, that the provisions that had been consumed by "fire," and not by the crew were protected by the policy, 91

EMBARGO.

See "ARREST, DETENTION OF KINGS, &c." "TOTAL LOSSES AND ABANDONMENT."

FRAUD IN POLICIES.

1. Policies are vacated and annulled by the least shadow of fraud or undue concealment, 571

2. There are three distinct cases where the policy may be vacated by the assured or his agent, 572

3. First,—where the assured or his agent has made some statement which he knew to be false, 573

4. Where goods were insured as the goods of an ally, but were in fact the goods of an enemy, this is a fraud and the policy is void, 573

5. Where an agent received a letter stating a ship to have sailed on the 24th November, and the agent told the underwriter that she sailed on the latter end of December, this is a fraud and the policy void, 573

6. Where a ship was warranted a Portuguese, and the assured by his answer to a bill, admitted that she was condemned for not being a Portuguese. Policy void, 574

7. A representation (contrary to the truth) that the insurance sought to be made, had been made by other underwriters at the same premium, vitiates the policy made by means of such misrepresentation, 575

8. Secondly,—case where the assured has stated something to be true, which he does not know to be true, and at the same time suppressing material circumstances, 576

9. The concealment of material circumstances vitiates all contracts on the principle of natural law, 576

10. On a representation to induce a party to make a contract, it is equally false for a man to affirm that of which he knows nothing, as it is to affirm that to be true which he knows to be false, 576

11. When the assured having heard a report that a ship described like his was taken, went and insured her without mentioning the rumour to the underwriter. Policy held to be void, 578

12. The time of a ship's sailing is not material to be communicated, unless she be a missing ship, or unless a ship which sailed after her has arrived, 579

13. A ship takes in her cargo at L. and sails to G. An insurance is made on the goods from G. to D., "to begin from the loading." The policy is void, it being a false description, calculated to induce a belief that G. was the port of loading, 581

14. Concealment of a letter from which the time of the sailing of the ship might be inferred, is material, 583

15. A broker's instructions stated that a ship was ready to sail on the 24th December. The broker represented the ship to be in port, when she, in fact, sailed on December 23. This was held to be a material misrepresentation, 583

16. Evidence of underwriters is admissible to prove what, in their judgment, is a material concealment of a fact, 584

17. The governor of a fort abroad insures against capture for a year: it is not necessary to disclose his speculations on the probability of an attack, 586

18. The underwriter trusts the statement of the assured, and that he does not keep back any circumstances within his knowledge to mislead him, 587

19. The assured need not mention what the underwriter knows, what he takes upon himself the knowledge of, or what he waives being told, 588

20. The underwriter is bound to take notice of natural and political perils, 588

21. The opinion of brokers and underwriters may be asked as to matters of prac-

tice in their profession; but they cannot be asked as to the materiality of a fact on which the jury are to give their verdict, 596

22. The insured is not bound to disclose a circumstance made material by a foreign ordinance of which he was ignorant, 601

23. Thirdly,—Cases in which the policy is void by misrepresentation, 602

24. Where a ship sailed with a greater force than was represented to the underwriters, held that the representation was substantially true, 602

25. Distinction between a warranty and a representation, 601

26. A ship insured on the 30th January, from New York to Philadelphia, is represented to be safe in the Delaware on the 11th December, when, in fact, she was lost on the 9th. This was held to avoid the policy, though the *bonâ fide* result of the assured's computation, 610

27. A material concealment avoids the policy, although the broker thinks it immaterial, 612

28. An expectation does not amount to a representation, 612

29. Where a ship is insured at and from a place, and does not arrive there for some time, this need not be communicated; but it is for the jury to say whether the delay varies the risk, 613

30. A letter ordering an insurance is put into the post before the loss, but starts after the loss is known. This is a misrepresentation, whether arising from fraud or negligence, 615

31. To an action on a policy made on a ship the defendant pleaded, 'that at the time of making the policy, the plaintiff wrongfully and improperly concealed from the defendant certain facts and information which the jury at the trial found to be material, and was known to the plaintiff when the policy was made. Held (dubitante, Pollock, C. B.,) that the defendant ought to have given some evidence of the non-communication of the fact, in support of his plea, 617

32. Where the policy was void by the fraud of the assured, the premium was decreed to be returned, 626

33. Where it was clear that the assured had heard of the loss before an order was given to insure, it was held that the premium should not be delivered back, 628

34. If an underwriter has been guilly of fraud, an action lies against him to recover the premium, 629

FREIGHT.

1. General principles relating to the commencement of the risk thereon, 159

2. The cargo ready to be put on board, but the ship not ready to receive it, the policy does not attach, 160

3. In the case of a valued policy a part of the cargo only on board, the rest ready, the assured recovered for the whole, 160

4. If a ship be chartered to a certain place to take in her cargo, and on her way there be lost, the underwriter on freight is liable, 163

5. Where a ship was chartered from A. to B., and back, at a certain freight for the outward voyage and the current freight home, and before she unloads her cargo, and before any of the homeward cargo is shipped, she is lost, the policy on the homeward freight attached, 165

6. Where freight was agreed to be paid when part of the voyage was performed; but, before the freight was paid, or the voyage finished, the ship was lost; as the charter-party treated the whole as one voyage, the policy on the freight attached, 165

7. When there is not an entire charter-party for the whole voyage out and home, and the ship takes out a cargo to be bartered for goods to be brought home, and a part of the outward-cargo is only discharged and bartered, the assurer on freight for the homeward voyage can only recover for the freight of the goods on board, 167

8. Where a ship under a charter-party was in a condition to take in her cargo, which was ready for her, but was lost in a hurricane before the goods were put on board, held that the policy on the freight attached, 170

9. In all cases where the freight is lost by a peril insured against, the assured is entitled to recover, though no goods be actually on board, provided the ship is ready to receive them, and the goods are ready to be shipped, or the owner has a contract with any one for their shipment, 171 to 175

ILLEGAL VOYAGES.

1. Where an insurance is made on a voyage expressly prohibited by the common, statute, or maritime law, the policy is void, 630

2. Where an insurance was made upon a cargo of goods exported to New York, in direct contravention of an act of Parliament, held that the insurance was void, 631

3. Where an insurance was made in direct contravention of the exclusive right of trading granted to the East India Company by 9 & 10 Wm. 3, c. 44, the underwriters were held to be discharged, 632

4. A natural-born subject of this country, domiciled in a foreign country in amity with this, may exercise the privileges of a subject where he is domiciled, 634

5. If a merchant expatriates himself as a merchant, to carry on the trade of another country, he is to be deemed a merchant of that country, 635

6. If a ship be insured "at and from" a place, and whilst she is there is engaged in

an illegal traffic, the assured cannot recover for a loss arising in the homeward voyage, 635

7. If a ship, though neutral, be insured on a voyage prohibited by an embargo laid on in time of war by the prince of the country in whose ports the ship happens to be, the insurance is void, 636

8. But this rule does not extend to trading contrary to the revenue laws of a foreign country; for no nation takes notice of the revenue laws of another, 638

9. How far trading with an enemy in time of actual war is illegal, 640

10. By the law of England, 641

11. An insurance on a neutral vessel trading to an enemy's country is valid, 642

12. Upon the breaking out of a war, neutrals have a right to carry on their accustomed trade, with the exception of contraband articles, &c., 642

13. But a neutral has no right to engage in the colonial trade of either of the belligerent parties, which he never possessed in time of peace, 643

14. By the common law, the trading with an enemy without the king's license is illegal, 644

15. The power of licensing particular trades with hostile states, in time of war, is part of the prerogative of the Crown, 644

16. The king may qualify his license, which must be strictly conformed to, 645

17. The condition must be strictly complied with, 647

18. The party having the license must show his authority to have it, and how he obtained it, 647

19. The fraudulent alteration of a license avoids it, even where the party claiming its protection is innocent of the fraud, 648

20. The Courts of Justice will permit every thing to be done, though not expressed, which is necessary in order to effectuate the intention of his Majesty in granting the license, 648

21. If the voyage, by unavoidable accident, be delayed beyond the time for which the license was granted, yet if the licensed adventure be *bonâ fide* prosecuted within any part of the period, the voyage is protected, and the policy on it valid, 652

22. An insurance made on behalf and on account of an alien enemy, not protected by a license, is void, though the goods were shipped before the war commenced. Nor can his agent maintain the action, though a creditor of the assured to more than the sum assured, 653

23. Neither can an action be maintained on a policy on the property of an alien enemy, though of British manufacture, and exported from hence, 653

24. An insurance made in Great Britain on a French ship, previous to the commencement of hostilities between Great Britain and France, does not cover a loss by British capture, 655

25. When a British subject insures against captures, the law infers that the contract contains an exception of captures made by the government of his own country, 658

36. Where a voyage is prohibited by the navigation laws of this country, the insurance upon the adventure is illegal also, and therefore void, 659

27. By a recent act against smuggling, persons insuring the delivery of prohibited goods, are to forfeit 500*l.* over and above any other penalty to which he may be liable. And there is the like penalty on the assured, 660

28. Where part of a cargo is legal, but intended to cover an illegal design, the whole policy is void. But if part of a cargo be licensed, an insurance of that part is not vitiated, though another part is not licensed and illegal, if there be no fraud, 660

29. Where an exportation was protected by a valued policy, the goods to be thereafter specified, and the specification contained prohibited goods, the contract was entire, and the policy void, 661

30. A sentence against a neutral by a British Vice Admiralty Court, is sufficient from which to presume that the ship had been engaged in some illegal transaction. A neutral meeting by an agreement a British vessel for the purpose of receiving gunpowder and arms, is illegal, even though the latter should have had a license to export them for the benefit of trade, 661

INTEREST INSURABLE IN GOODS AND PROPERTY, &c. *See* USAGE.

1. Some things must be specially named in the policy. Horses and other live animals, &c., 14

2. Bottomry and respondentia interest must be so specially stated in the policy, 15

3. Special interests in goods may be recovered under the term "goods" in the printed policy, 17

4. And generally it is necessary to state accurately the subject-matter of the insurance, but it is not essential to state the nature of the interest, 17

5. Where the consignee of goods pledges the bill of lading with another person as a security for advances made by him, and upon an agreement that the consignee shall make an insurance on the goods for the benefit of the pledgee, and deposit the policy with him, the pledgee may sue on the policy in his own name, 35

6. At common law, a person might insure without having any interest, 33

7. It "is settled that the merchant need only prove some interest to take it out of 19 Geo. 2." Lord Mansfield, 37, 39

8. Profits expected to be made, are a good insurable interest, 38

9. And where the expected profit is valued in the policy, this does not make it a "wager" policy; the plaintiff must prove some value, but it is not necessary to go into the whole, 39

10. The distinction between a valued and a wager policy is this, if the plaintiff must prove his interest, and the policy only saves him the trouble of showing its amount, it is a valued policy and good: but if it dispenses with all proof of interest, it is within the act and void, 39

11. The commissions of the assured as consignee of the cargo, valued at 1,500*l.*, held a 'good insurable interest.' 40

12. The principle of insuring profits is grounded on the justice of allowing maritime adventurers to protect by insurance not only the thing immediately subjected to the perils insured against, but also the advantages arising from the arrival of the thing insured safely at its place of destination, 41

13. But there must be a reasonable certainty of the profits, and not a mere speculative expectation, 47

14. And the assured must show that but for the intervention of the perils insured against, profit would have been made, 47

15. Where goods were expected to arrive by a particular ship, but there was no contract in respect to the goods which the assured could have enforced, he has not an insurable interest: it amounts, in fact, to an insurance on a void contract, 50

16. An insurance made on any packet boats which should sail from Lisbon to Falmouth, for one year, upon any "kind of goods." The assured had an interest in bullion on the Hanover packet, one of the King's packets between Lisbon and Falmouth; it was lost within the time in the policy: assured had an insurable interest, 50

17. The captors of a prize have an insurable interest in such prize, on the ground of their having a reasonable expectation of their receiving from the Crown the property captured, 51

18. The commissioners authorized by statute to take into their care all Dutch ships detained or brought into the British ports, and dispose of them according to directions from the Privy Council, may insure them in their own names after seizure at sea on their voyage to England, 55

19. The King has an undoubted insurable interest in the ships and cargo taken possession of under the authority of the statute, 56

20. And where an insurance is made for the benefit of his Majesty without his knowledge, his Majesty may ratify it, and the insurance will enure to his benefit, 60

21. The above rule applies to any person, 62

22. A defeasible right is frequently insurable. The indefeasibility of it is not the criterion of an insurable interest, 66

23. A consignee has a good insurable interest, 68

24. If at the time of making an insurance, the assured had an insurable interest in the thing insured, it is immaterial that the property may have passed to another party, for the assured may sue for his benefit, 70

25. If goods be consigned to a merchant, and he makes an insurance upon them when he knows they have been despatched, and then a "stoppage in transitu" takes place, and then a loss, the assured cannot sue, for he had lost his right in his interest before the loss happened, 71

26. Where the Courts see that on the face of the policy there is no contract of indemnity between the parties, but only a gaming transaction, they never hesitate in declaring the policy void, 72

27. Where by the express terms of a charter-party, the shipowner makes a stipulation with the freighter, that part of the freight shall be paid in advance, the freighter has an insurable interest in that advance: but a mere loan for the use of the ship gives him no insurable interest, 74

28. The underwriters on a policy "on merchandises," are not liable to charges and expenses incurred at the ship's port of loading, considered as additional value imparted to the goods, 77

JETTISON.

Where a captain threw a quantity of dollars overboard, to prevent them falling into the hands of the enemy, by whom he was about to be attacked, and was immediately after captured, this was held to be a loss by "jettison" in the general use of the term, or at any rate to be a loss *ejusdem generis*, and protected by the general terms of the policy "all other perils," &c. 285

"LOST, OR NOT LOST."

1. These words are peculiar to English policies, 10

2. If the contingent event has happened at the time of making the insurance to the knowledge of one of the parties only, the policy is void on the ground of fraud, 11

3. The assured makes no assurance to the assurer that the ship or goods are safe at the time of making the insurance, 10

4. A party may make an insurance on "goods" "lost or not lost," though he may

have acquired his interest after an average loss has happened, unless he bought them with a knowledge of the damage, 12

5. It is no answer to an action on a policy "lost or not lost," that the interest was not acquired till after the loss, 12

6. Such a policy is a "contract of indemnity" for past as well as future losses, 12

LOSSES.

I. Total. II. Average.

I. Total Losses and Abandonment.

1. The words in the policy, "and in case of any loss or misfortune," lead to the inquiry respecting the distinction between total and average losses, 354

2. The doctrine of total losses "on goods" as distinguished from average losses explained, 355

3. Whether a loss "on goods" be total or average in its nature must depend upon general principles, 357

4. The object of the policy is to obtain an indemnity for any loss the assured may sustain by the goods being prevented, by the perils of the sea, from arriving in safety at their place of destination, 357

5. Whether, upon such an event, the loss is total or average depends upon circumstances; but the existence of the goods, or any part of them in specie, is neither a conclusive nor in many cases a material circumstance to that question, 357, 358

6. If the goods be of an imperishable nature, if the assured become possessed of them, and have an opportunity of sending them to their destination, the mere retardation of their arrival may be of no prejudice to them, more than the expense of reshipment. In such a case the loss can be but an average loss even though the assured elect to sell them where they have been landed, 358

7. But if the goods once damaged by the perils of the sea, are, by reason of that damage, in such a state, though the species may not be utterly destroyed, that they cannot be reshipped into the same or any other vessel; if that before the termination of the original voyage the species itself would disappear, and the goods assume a new form, losing all their original character; if, though imperishable, they are in the hands of strangers, not under the control of the assured, if by any circumstances over which he has no control, they can never, or in any assignable period, be brought to their original destination; in any of these cases, the circumstance of their being in specie at that forced determination of the risk, is of no importance. The loss is, in its nature, total to him who has no means of recovering his goods, whether his inability arises from their annihilation or from any other insuperable obstacle, 358

8. When a total loss has thus taken place before the termination of the insured voyage, with a salvage of some portion of the subject insured which has been converted into money, the assured may recover as for a total loss without an abandonment, 360, 366

9. Some account of the origin and history of abandonment, 361

10. The history of our own laws furnishes few, if any, illustrations on the subject before the time of Lord Mansfield; and that great Judge, in laying down the rules and principles in the leading cases on this subject, was obliged to resort to the aid of foreign codes and to the opinions of foreign jurists, for his guide and information, 361

11. And even those foreign rules are of very modern date, 361

12. When a policy of assurance was considered in the nature of a wager, the notion of abandonment was never entertained or thought of, 361

13. When assurances became contracts of indemnity, the obligation of abandonment became the necessary consequence of confining the contract to that object, 362

14. In some foreign codes abandonment was imperative, and such formerly was the law in France, by the ordinances of Louis XIV. in 1681. But now, by the code of commerce, abandonment is confined to those effects which are the object of the assurance and the risk, 363

15. But now the law relating to marine insurances is quite settled in this country, and the nature and principle of the law of abandonment is quite established by decisions in our courts of justice, 364

16. The assurer engages that the thing insured shall arrive at its destined termination in perfect safety, 364

17. The assured when he elects to treat a case as a total loss, must make a cession to the assurer of all his right, and in a reasonable time, 365

18. The assured may prevent himself from recovering a total loss, if he voluntarily does any act whereby the interests of the underwriters may be prejudiced, 366

19. In capture the chance of restitution does not suspend the demand for a total loss upon the underwriter, 371

20. In questions upon policies, the contract as an indemnity, and nothing else, is always liberally considered, 371

21. In all cases the assured may elect not to abandon, 372

22. The master cannot sell the ship in case of a loss, except in a case of absolute necessity, 378

23. As between the assured and assurer, the ship is totally lost by capture, though by

recapture it may revert to the former owner, 382

24. If the voyage be so defeated as not to be worth further pursuit, the assured may abandon, 382

25. But it is repugnant on a contract of indemnity to recover for a total loss, when the event has decided that an average loss only has been sustained, 383

26. If the ship be recovered after a long detention, it is not a total loss even on a wager policy, 384

27. The assured shall not be allowed to abandon, either to avail himself of having overvalued, or of the market below the invoice price, 386

28. The assured can recover only an indemnity, according to the nature of his case, at the time of bringing the action, or at the time of his offer to abandon, 387

29. The effect of abandonment is, that if the offer turns out to have been properly made upon the supposed facts which turns out to be true, the assured has put himself in a condition to insist on his abandonment, 390

30. The abandonment must be viewed with regard to the ultimate state of facts appearing before action brought, 393

31. In deciding the question whether a party not insured would prefer giving up the adventure and repairing a ship at an enormous price—it is proper that the jury should take into their consideration the national character of the ship which materially affects her value, 399

32. Where the defendant had paid 48*l.* into Court, and the jury found that there was only 48*l.* per cent. damage. It was held to be only an average loss; though, when she arrived at her port she was not worth repairing, 402

33. Where a ship is obliged, by sea-damage to put back into port, and cannot be repaired there, and no other vessel could be obtained, and the cargo is much damaged, this is a total loss, 406

34. A mere retardation of a voyage where the insurance was on the cargo not of a perishable nature, is not a ground for abandonment, 408

35. If a ship be in such a situation that the master has the means within his reach to restore it to the character of a ship, it is not a total loss. There is no principle of insurance law as loss by sale, 409

36. A ship being wrecked was sold by the owner, and soon after got off by the purchaser, though at a great expense. The owner cannot treat this as a total loss, if the ship could have been repaired so as to have sailed home in ballast, or with some sort of a cargo, 409

37. In what cases abandonment must be given, 411

38. Where the thing insured subsists in specie, and there is some chance of recovery, there must be an abandonment, 412

39. Where a ship is so much injured by the perils of the sea, that she cannot be repaired at all, except at an expense exceeding her value when repaired, the assured may recover without an abandonment, 412

40. The assured cannot abandon on account of the port of destination being shut against the ships of the nation to which the ships belong, 414

41. If a ship insured to a foreign port, learning in the course of her voyage that an embargo is laid on the ships of her nation, wait at a place as near as she safely can till the embargo is removed, the goods on board insured, will in the meantime be protected by the policy, 417

42. But if instead of doing so, she sails back to her port of outfit, and is lost, she will be considered to have abandoned her voyage, and the underwriters are discharged, 417

43. Where a loss was attributable merely to the fear of a hostile embargo, at the port of destination, held not to be a loss by the detention or arrest of kings, 417

44. The effect of abandonment of the ship to the underwriters, so as to pass to them the ship's future earnings or freight, 420, 427

45. And where there are separate insurances on the ship and freight, and the owner abandons to the underwriters both of ship and freight, the abandonee of the ship has a right of the after accruing freight, independently of the abandonee of freight, who may have his own remedy against the owners, where he had insured their freight, which being lost, was paid by the underwriters on freight, with an agreement that he was to have the benefit of the abandonment to him of the freight to be earned, 427, 428, 429

46. Freight follows as an incident to the property in the ship, 427

47. The abandonee of a ship has all the rights of the shipowner cast upon him, 428

48. Within what time abandonment ought to be made? In England the assured ought to abandon to the underwriters as soon as he hears of the loss and elects to do so, 430

49. In foreign maritime states, the time of abandonment in different voyages is fixed by positive regulations, 430

50. The assured by the law in England must make his election speedily. He cannot lie by and treat the loss as average, and afterwards abandon to the underwriters, 432

51. So an underwriter is bound to say, within a reasonable time after notice of abandonment, whether he will accept it or not, 433

52. An abandonment may be by parol, but it should be certain; the word 'abandon' ought to be used, 433

II. Average Losses.

1. In an average loss the thing insured is supposed to exist in specie, but there is a possibility, however remote, of its arriving at its destination, or at least of its value being in some way affected by the means which may be adopted for the recovery or preservation of it, 435

2. Whether a loss be total or average in its nature, must depend upon general principles, 436

3. If the goods be of an imperishable nature, if the assured become possessed of them, or can have the control of them, if they have an opportunity of sending them to their destination, the mere retardation of their arrival may be no prejudice to them, except the expense of reshipment in another vessel, 436

4. And where the goods consisted of copper which was wholly uninjured, and of iron, which was partially damaged, and the assured had possession of them, and the ship was capable of repair, and might have prosecuted the voyage—this was held to be an average loss, 437

5. And where some rice had arrived at its destination, and though damaged, was delivered to the consignees in a saleable state, as rice—this is only an average loss, 437

6. And where some tobacco and sugar, though damaged by the perils of the sea, were in the hands of the owner, and might, for any reason that appeared, have been forwarded to its port of destination—held to be an average loss, 437

7. And where some wheat was partly saved, and was in the hands of the shipper: was kilndried, and might have been forwarded, as the rest of the cargo was, to its port of destination; but the shipper, after dealing with it as his own, abandoned too late. Held to be only an average loss, 438

8. So in the case of a ship, if she be not bodily and specifically lost, and there be no circumstances attending, which would render the loss total by the law of marine insurances: this is only an average loss, 439

9. The loss of the original voyage will not make a constructive total loss of the ship; if she can be repaired so as for her to sail to her destination, in ballast, or with any kind of a cargo so as, on her arrival, to be worth the money expended on her, she ought to be repaired for the purpose, where it is possible to do it, 440

10. The rule for calculating the average losses on goods, is laid down by Lord Mansfield in Lewis v. Rucker, and his Lordship said afterwards in another case, that the rule laid down in Lewis v. Rucker, should always be followed where there was a description of casks or goods, 440

11. But where the property consisted of a variety of goods, and part of them were lost by the perils of the sea, the only rule was to go into an account of the whole valued in the policy and take a proportion of the whole value as the amount of the goods lost, 441

12. Upon a policy on goods to recover an average loss, it is immaterial whether the goods arrive at a good or a bad market, for the true rule to estimate the loss, is to take them at the fair invoice price, 441

13. And the underwriter is not liable to any loss that may arise from the difference of the exchange, 441

14. The underwriter is not restricted to the amount of his subscription, but he may be subject to several average losses, or to an average and total loss, or to money expended "in and about the safeguard and recovery of the ship," to a much greater amount than his subscription, 442

15. But the assured cannot recover for more than he has been damnified, and cannot recover for an average loss, which has not been paid by the underwriters, when it is afterwards followed by other circumstances which render the previous deterioration a matter of perfect indifference to the assured's interest, 443, 449

16. The assured cannot recover for an expense which might have been incurred, but never was incurred, 450

17. Where repairs are actually done, and prudently done, they are a fit measure of the assured's loss: he is so much the worse for a peril within the policy, 450

18. Expenses of this kind come under the clause of the policy, which enables the assured to lay out money for the benefit of all concerned, 451

19. The proportion of the damage which the assured has sustained, is to be calculated from the gross and not the net prices of the sound and damaged goods at the port of delivery, 452

20. In an open policy the invoice price, together with the premium of insurance and commission, form the basis of the value of the goods, 454

21. In policies on freight, the loss is calculated on the gross and not on the net amount, 456

22. Of the common memorandum in the policy, 457

23. It has been uniformly held upon this clause, that the underwriters can in no case be answerable for an average loss to such goods mentioned in the memorandum, unless the ship be stranded, 464

See "Stranding" in the article "Ship."

24. On a policy on wheat, with the common memorandum, and the wheat sustained an average damage, 56*l.* 19*s.* 8*d.* per cent. The underwriters held not liable, 465

25. A ship with a cargo of fruit, is forced by stress of weather to put into a port out of her regular course. The fruit is so spoiled by the seawater, and stinks so, that the government prohibited the landing: the ship also is so much damaged as not to be able to proceed: held to be a total loss, 469

26. Where a cargo of fruit was captured and recaptured, and brought to its port of destination, but damaged eighty per cent., held to be only an average loss, 471

27. In an action on a policy on peas, the peas arrived at the port of destination, but so much damaged, as to be sold for three-fourths less than the freight; held that as the goods mentioned in the memorandum, arrived at the market, the underwriters were not liable, 472

28. Where the policy was declared to be on hogsheads of sugar, and every hogshead was saved with some sugar in it, this was held an average loss, 473

29. The memorandum is likewise usually modified by an express stipulation to pay average on each species of produce and on separate packages, 474

30. But this stipulation does not prevent the average being calculated on the whole cargo, if it amount to three or five per cent. on the whole, 474

31. On the words "free from average under three per cent." the underwriter is liable for the amount of the aggregate of several average losses, each less than three per cent., but amounting in the whole together to more, 475

THE ADJUSTMENT.

32. If an agent had subscribed the policy, and had authority to do so, he has also authority to sign the adjustment, 481

33. The adjustment is *primâ facie* evidence against the underwriter without any further proof of the loss: except in cases of fraud, 481

34. Where evidence was given that after an adjustment doubts had arisen in the minds of the underwriters, and that they refused to pay. Held that the plaintiff must give further proof, 483

35. The effect of the adjustment is to throw the "*onus probandi*" upon the underwriter, 484

36. An underwriter who, upon a full disclosure of facts, has signed his initials to an adjustment without paying the loss, is not precluded in an action against him, from availing himself of the circumstances which he was acquainted with, before signing the adjustment, 485

37. An adjustment is not binding upon an underwriter, if his attention be not drawn at the time to circumstances, by which the underwriters would have been discharged, though he then had the means of acquainting himself with them, 486

38. But where there is a full knowledge of the facts and a settlement made, the assured cannot resort again to the underwriter in any contingency of the event, 487

39. The production of a policy with an adjustment indorsed on it, and the underwriter's name run through, is not of itself proof of payment, 487

40. If at the time of the adjustment the underwriter pays as for a total loss, and it turn out afterwards only an average one, he shall not recover the money back, but he stands in the place of the assured by having the benefit of salvage, 488

41. But where a compromise has been entered into by the underwriters, they can make no claim to a restitution at a future period, 490

MASTER OF THE SHIP.

1. Every ship must have a master of competent skill, 110

2. And where any loss occurs from the ignorance of the master, the underwriters are discharged, 110, 113

3. The master is frequently called upon to exercise his judgment, and to act to the best of his understanding for the benefit of both parties; and if he were proved to be a person of competent skill when he sailed on the voyage, the underwriter is liable for the consequence of his acts, 113

4. If a master do what is usual in the course of a particular voyage, and a loss accidently happen at the time, the underwriters continue liable, for when they underwrote the ship they knew what was to be done on such voyages, 87

5. If the risk be altered by the fault of the master or owner, the underwriters are not liable. But if the master vary the risk, "*ex justâ causâ*," the liability of the underwriters continue, 87

6. The master is agent for the freighter as well as the owner, 114

7. The master has an implied authority both from the underwriter and the assured, to do the best he can for all concerned, 114

8. The master must by law take on board a pilot at different parts of the voyage when required of him, 115

9. The underwriters are not discharged by the default of the pilot in charge of the ship, and who is master for the time he continues on board, 117

10. By the provisions of the Pilot Act, no underwriter shall be discharged for reason of no pilot being on board, unless it be proved that the want of a pilot shall have arisen from any refusal to take a pilot, or from the wilful neglect of the master in not heaving to, or

using all practical means to procure one consistently with the safety of the ship, 118

11. If a ship sail from a port where there is an establishment of pilots, and the nature of the navigation requires one, the master must take one, 119

12. So if in the course of her voyage the master arrives at a port or place where a pilot is necessary, he ought not to dismiss him till the necessity has ceased, 119

13. But if a vessel sail to a port, where the establishment is such that it is not always possible to procure the assistance of a pilot before the ship enters into the difficult part of the navigation, then as the law compels no one to perform impossibilities, all it can require in such case is, that the master use all reasonable efforts to obtain one, 119, 120

14. In a general average it is the duty of the master, if the ship ride out the storm and arrive at its own port, or port of safety, to make regular protests, and swear, with which part of the crew must join, that the goods were thrown overboard for no other cause, but for the safety of the ship, 500

MORTGAGOR.

A mortgagor of a ship who is also master, is considered still owner, in order to disable him to commit an act of barratry, 342

NON-COMPLIANCE WITH WARRANTIES.

1. It is a clear and first principle of the law of insurance, that where a thing is warranted to be of a particular nature, or description, it must be such as it was stated to be. It is no matter whether it be material or not; the only question is, "is this the thing *de facto*," that I have signed? 663

2. Ship "warranted well on a particular day," insured, "lost or not lost," the policy was underwrote at between one and three o'clock in the afternoon, the ship was lost at eight in the morning of the same day, the warranty is complied with if the ship is safe at any part of that day, 663

3. Distinction between a warranty or condition which makes part of a written policy, and a representation of the case, 664

4. In order to make written instructions binding as a warranty, they must appear on the face of the policy, 664

5. Warranty as to the time of sailing, 670

6. Where a ship warranted to sail on or before the 26th July, free from capture, and restraint and detainments of kings, &c. The ship was ready to sail before the 26th July, if she had not been detained by order of the governor. Held that the warranty was positive and express that the ship should depart on or before that day, 671

7. If a ship be warranted to sail after a particular day, and she sail before that day, the policy is void, 671

8. If a ship is warranted to sail on before a particular day, if she sails from her port of loading with all her cargo and clearances on board before the day, to the usual place of rendezvous at another part of the island, for the sake of joining convoy, it is a compliance with the warranty, though she be afterwards detained by an embargo beyond the day, 672

9. It does not signify what was the cause which prevented the ship from sailing; but if she did not sail on or before the day required, the policy is void, 675

10. But if the ship breaks ground, and is fairly under sail on the day required, and afterwards puts back from stress of weather, or apprehension from an enemy, or is put under an embargo, though she has gone ever so little way, it is still a beginning to sail, 675

11. But where the warranty is to depart on or before a given day, the ship must be actually out of port, and it is not sufficient that she has broke ground to satisfy a "warranty to sail," 683

12. At the time of a ship's sailing, she must have every thing ready for the performance of the voyage, and nothing remaining to be done afterwards, 684

13. Secondly,—Warranty to sail with convoy, 693

14. This means sailing under the protection of ships of force appointed by government, in time of war, to sail with merchantmen from their port of discharge to the place of their destination, 693

15. If a ship do not sail with a convoy appointed by the government of the country this is not a sailing within the terms of the policy, 694

16. Sailing instructions from the commander of the convoy are necessary, 696

17. To "depart with convoy," means to sail with convoy throughout the whole of the voyage, 698

18. A ship joins convoy, but by stress of weather is unable to get sailing instructions; this was held to be nevertheless a departing with convoy, 700

19. Where, by the neglect of the ship insured, she failed to sail with convoy, the underwriters were discharged, 702

20. The warranty is to be construed with reference to the usage of trade and the orders of government, 702

21. Thirdly,—Warranty that the ship or goods are neutral property, 704

22. Policy on goods "warranted neutral ship and property." The ship and goods were lost by bad weather, but the ship at the time she was lost, was not neutral property. Held that the contract was void, 704

23. If the ship or property are warranted

neutral, it is sufficient if they are so when the risk commences. The assured does not warrant they shall continue so during the voyage, 705

24. The question how far the Courts of Law in this country, consider the sentence of foreign Courts conclusive evidence that the property was not neutral, 707

25. It has been the constant usage that the tribunals of the law of nations should exercise their functions within the belligerent country, 709

26. The principles laid down in the Court of Admiralty in this country are agreeable to the decisions of the Courts of Law upon the subject, 710

27. Where a sentence was pronounced by a belligerent, on neutral territory, it was held void, 711

28. But if it appears beyond doubt that the sentence proceeded on the ground of the property not being neutral, it is conclusive evidence against the assured, that he has not complied with the warranty, 713

29. Where a ship was condemned generally as "good and lawful prize," it was held conclusive to falsify the warranty, that the goods were neutral, 715

30. The sentence is conclusive only as to the points it professes to decide, 717

31. If no leave is given to a ship to carry simulated papers, and the ship is condemned for carrying them, the underwriters are discharged. Otherwise if leave be given, 718

32. Where a sentence went upon a French ordinance, and condemned a Dutch ship because she had an English supercargo on board, (being an enemy,) this sentence was held to be illegal and not conclusive against the warranty, 718

33. So, where a ship was condemned because the captain was "an enemy" and nothing else, the sentence was held not to be conclusive to falsify the warranty, 719

34. Courts of Admiralty proceed on the "law of nations," and such treaties as particular states have agreed shall be engrafted on that law. But no one state can add to the "law of nations," an arbitrary ordinance of its own without the concurrence of other states, 721

35. A ship belonging to a state in amity with a belligerent, should be furnished with such documents as have, by treaty, being agreed on, to shew her character. But no ship is required to be furnished with every document required by the ordinances only of a belligerent power, 723

36. Where a ship warranted Swedish is captured by the French, and condemned. The Court of Prize, after stating the principal question to be, whether the ship and cargo were enemy's property, condemns both as good prize, without any express adjudication as to the property. Held, that this sentence must be taken to have proceeded on the ground of enemy's property, and to be conclusive to falsify the warranty, 729

37. A sentence of a Court of Admiralty proceeding "*in rem*," is conclusive and binding upon all the world, 733

38. The party who sets up the sentence is not obliged to shew that it proceeded on the ground of enemy's property, but it lies on the other party who objects to it, to shew that it proceeded on some other ground, 733

39. A sentence of a Court of Admiralty is conclusive as to all it professes to decide, 736

40. Finally settled by the House of Lords, that "the sentences of foreign Courts of competent jurisdiction to decide questions of prize, are of conclusive evidence in actions on policies of insurance, on every subject within the jurisdiction of the Court, and in which they profess to decide judicially," 738

41. But the Court must distinctly decide the point, in order to affect a warranty or representation in a policy, and it is not to be collected by inference, 739

42. Where a foreign Court of Admiralty alleges reasons for the sentence, from which it appears that it proceeded on other grounds than being enemy's property, the sentence is not conclusive against the warranty of neutrality, 741

43. Where in a case of insurance on "goods" on board the ship George, it became the principal question in the case, whether a sentence of condemnation in the Prize Court of Monte Video, was to be received as conclusive evidence of the fact, that the ship was captured in attempting to break a blockade; held, that as it was not possible safely to infer from the terms of the sentence, that the precise ground of the sentence was the attempt to break the blockade, that the sentence was expressed with so much doubt and ambiguity as to the real ground on which it proceeded, that it was not conclusive evidence of the captain's having attempted to break the blockade; and the assured recovered, 741

44. The right of visiting and searching merchant ships upon the high seas, is an incontestible right of the lawfully commissioned cruisers of a belligerent nation, 747

PERILS OF THE SEA.

1. Every loss which happens to a ship by the immediate act of God is a loss by a "peril of the sea," 270

2. Where a ship was driven on an enemy's coast by a gale of wind, and is captured, and not damaged by the wind, this is a loss by "capture," and not a loss by the "perils of the sea, 270

3. Where a ship went on shore, in consequence of two sailors being prevented by a pressgang from casting off a rope, as they had been ordered, held to be a loss by "peril of the sea," 270

4. Where a ship warranted free of American condemnation, slipped away in the night, and was afterwards, by the ice, tide, and wind, driven on shore, and ultimately condemned for breach of the embargo, the underwriters were discharged, 271

5. Where an insurance was made on goods on board a ship "warranted free from capture and seizure," and the ship was stranded on a shoal, and was lost; but, whilst she lay on the sand, she was seized by the commander of the place, and her goods were confiscated by him, this was held to be a loss by "the perils of the sea," 271

6. And where there was an insurance on goods, and where the ship was actually wrecked, part of the goods lost and part got on shore, where they were plundered and destroyed by the inhabitants, this was held to be a loss by "perils of the sea," 271

7. And where a ship had sprung a leak, and the captain, with the hope of saving part of the cargo, had run her ashore, where ultimately she had gone to pieces, it was held to be a "peril of the sea," 272

8. But the loss must have been proved to have been occasioned immediately by one of the perils insured against, and where a declaration in an insurance on slaves stated, that "by perils of the sea, contrary winds, currents," &c., the voyage was retarded so much that there was no water remaining for the slaves, some of whom perished in consequence, and it was proved at the trial that the voyage was delayed by the fact of the master missing his port, this was held not to support the allegation in the declaration, "that the loss happened by perils of the sea," 272, 273

9. A loss by collision is a loss by "peril of the sea," 273

10. Ship sunk at sea, by being fired at, by mistaking her for an enemy, is a loss by "peril of the sea," or, if not, at least comes under the general words "all other perils," &c., in the policy, 275

11. Where a vessel was ordered into a dry harbour, the bed of which was hard and uneven, and, on tide having left her, she received damage by taking the ground, held to be a loss by "peril of the sea," 277

ALL OTHER PERILS, &c.

See JETTISON.

12. The effect of these general words in the policy, 248

13. They are to be restrained in construction to perils of the same kind to those inserted in the policy, 349

PILOT.

See SHIP, *and* MASTER OF SHIP.

PIRATES, ROVERS, THIEVES.

I. PIRATES.

Captures by pirates as between the assured and assurer, are upon the same footing as captures by an enemy, 303

II. ROVERS AND THIEVES.

1. If the thieves be on board, the master of the ship is to answer for the loss, and to make it good, according to Malyne; and the assurers are not to be charged with such loss; for he supposes that the word "thieves," mean "assailing thieves," in the policy, and their being coupled with the term "rovers," by the maxim of "*noscitur a sociis*" he seems to be right, 303

2. Roccus is of the same opinion, 304

3. The underwriters are liable for a robbery of goods from without, for thieves are a "peril" expressly insured against by them, 304

POLICY, CONSTRUCTION OF.

1. The immediate and not a remote cause of the loss is looked to by the Court in construing a policy: and if this be covered by the terms expressed in the policy, they will hold the underwriters liable, although the loss may be attributable, in the first instance, to a remote cause not covered by the policy, 268

2. It is a maxim of the law of marine insurance, that the assured, having provided a complete crew and master of competent knowledge at the commencement of the voyage, makes no warranty that they shall do their duty during the continuance of it; nor are the underwriters exempted from their liability in case of a loss arising immediately from one of the perils insured against, although remotely owing to the negligence of the master and crew, 269

3. The Courts, in putting a construction upon policies will always be guided by the custom and usage of trade, 197

4. In all mercantile transactions the great object should be certainty, and therefore it is of more consequence that a rule should be certain, than whether the rule is established the one way or the other, because speculators in trade then know what ground to go upon, per Lord Mansfield, in Vallejo v. Wheeler, Cowp. 153, 323

5. And by Mr. Justice Willes, in Lockyer v. Offley, 1 T. R., 252, 329

OF THE PROCEEDINGS IN THE ACTION.

1. The relief, which by the law of this country is given to either party to the contract of assurance, is generally by an action at law, 783

2. There are some cases where the parties may get relief in equity, as for an injunction to stop an action at law, 784

3. A court of equity will not alter a policy in the absence of strong proof of its being contrary to the intent of the parties, 784

4. But where a policy has been drawn up, by mistake, in terms which are not conformable to the real intentions of the parties, the instrument may be rectified in a court of equity by the slip or label, 78

5. At common law a policy cannot be altered after it had been signed, without the consent of the parties, 784

6. A court of equity will give relief in a case where there is a suspicion of fraud in the assured, and in such cases will compel him, on oath, to make a full disclosure of all the circumstances within his knowledge, 784

7. All issues on policies of assurances are tried in the courts of common law, 784

8. And a clause in a policy that in case of a dispute it should be referred, is no bar to an action at law where there has been no reference in fact, nor is depending, 784

9. The remedy against the two old incorporated companies is by debt or covenant, and so in the case of other incorporated companies, 785

10. The remedy against a private underwriter is by action of assumpsit, 786

11. Consolidation of actions. The rule: its nature, and the terms on which it is usually made, 786, 787

12. The venue may be changed, unless the policy be under seal, or the cause of action arise out of the realm, 789

13. The declaration. The date of the execution of the policy, a copy of which is inserted therein, 789

14. The stamp required by law on the policy, 789

15. The plea, 796

16. Payment of money into Court, and the proceedings of the plaintiff after, 796

17. What the plea of payment into Court admits? 796

18. The issue, 803

19. Proof of the defendants subscription of the policy, or of some person subscribing for him by his authority, 803

20. The plaintiff must prove his interest in the subject-matter, by production of bill of lading, &c., 804

21. Proof of the ownership of the ship, &c, 805

22. The plaintiff must prove that the loss happened as is averred in the declaration, 809, 811

OF RE-ASSURANCE AND DOUBLE ASSURANCE.

I. Re-Assurance, 773

1. Re-assurance, as understood by the law of England, may be said to be a contract which the first assurer enters into, in order to relieve himself from those risks which he has incautiously taken by throwing them upon other assurers, who are called re-assurers, 773

2. By sect. 4 of 19 Geo. 2, c. 37, it is unlawful to make re-assurance, unless the assurer be insolvent, become bankrupt, or die, 773

II. Double Assurance, 775

1. Where a person has made a double assurance, he may recover the whole sum upon the first action, and leave the defendant to recover a rateable satisfaction from the others, 775

2. Where an assured had recovered against the underwriters of the second insurance, the latter were held entitled to recover against the underwriters on the first policy for their contribution, 776

3. Where there are several insurers they shall all contribute pro ratâ, 779

RETURN OF PREMIUM.

1. Whether there is to be a return of premium in case of fraud; see *ante*, in article "Fraud in Policies," 625

2. Where the interest turns out to be less than the amount insured, there shall be a return of the overplus premium, 751

3. Where a policy was made on goods on behalf of the plaintiff by an agent, and a premium paid, and the policy was void, as no goods were ever on board, it was held that the plaintiff might recover the premium from the underwriter, in an action of money had and received to his use, 752

4. The parties often agree that there shall be a return of part of the premium upon the happening of a certain event: for instance, if the ship sail with convoy for the voyage, and arrive safe, 752

5. Goods are insured from Grenada to London at eighteen guineas per cent., "to return eight per cent. if the ship sails with convoy, and arrives." The ship sailed with the convoy, which left her, as usual, at the Downs; after which an average loss happened, but the ship arrived safe at London. Held that the underwriters were liable to return eight per cent. on the value of the goods in the policy, notwithstanding the average loss, 753

6. On a policy on freight, "to return ten per cent. if the ship sail with convoy and arrive." The ship sailed with convoy, was captured and recaptured. The assured are entitled to a return of premium, although the underwriters were obliged to pay salvage, 755

7. Where several policies are made, and the interest turns out less than the amount insured in the whole, there must be a rate-

able return of premium upon all the policies, 756

8. But where there were five policies made on a cargo of cotton, then at sea, on the 12th April, which did not amount together to the value of the subject-matter insured; and on the 13th of April, news having arrived of the vessel's safety on that day, six other policies were *bonâ fide* made, the amount of which, together with the former, exceeded the value of the subject-matter insured; it was held that the assured were entitled to a return of premium on the amount of the over-insurance, taking the account from the whole of the policies which had been made, and this was to be paid rateably by the underwriters on the policies of the 13th, but that the underwriters on those of the 12th were to be exempted, 757

9. Where the risk has not been run, either owing to the fault, or the pleasure or will of the assured, or to any other cause, the premium shall be returned, 757

10. Where the risk has once commenced, there shall be no apportionment or return of premium, 758

11. But where a voyage from London to Halifax was insured on the contingency of sailing from Portsmouth with a convoy, (particularly named) which contingency did not happen, it was held that the assurer was entitled to retain only a proportional part of the premium, 759

12. Where an insurance was made by an agent here on goods, "at and from a port in Russia to London," on behalf of a Russian subject abroad, which, in fact, was made after the commencement of hostilities by Russia against this country, but before the knowledge of it here, and after the ship had sailed and been captured, it was held, that the voyage being void in the commencement, that the plaintiffs were to recover back the premium, inasmuch as the insurance was made without any consciousness of its illegality at the time, 759

13. But where an insurance was made previous to the commencement of hostilities, and was held to be void on account of the capture being made by the King's forces, the underwriter being a resident subject of his Majesty in this country, it was held that the plaintiff could not recover the premium back, as the contract was at the time it was made legal for all losses, except loss by British capture, 760

14. Where the plaintiff had made an insurance on behalf of captors, which was void for want of interest in the captors, as there was no illegality in the voyage or insurance, and as the resistance of the underwriters to the claim under the policy proceeded on the ground that there was no risk, held that the plaintiff was entitled to a return of the premium, 761

15. Where a premium had been paid to cover a trading with the enemy, though the insurance was void, the premium could not be recovered back, 763

16. Where an insurance was made in violation of the Navigation Acts, it was held that the premium could not be recovered back, 764

17. But where the policy is void, on account of the subject-matter not being insurable, the assured may recover the premium, 764

18. Where a policy was vacated by a deviation in the voyage, as the insurance was "at and from" the port of departure, the risk had commenced, and there could be no return of premium, 764

19. Where the policy was "at and from Jamaica to London, warranted to depart with convoy for the voyage, and to sail on or before the 1st August," the ship sailed on the 31st, without convoy, and the jury found that in such cases there was a usage to return the premium, deducting one-half per cent. Held that the express usage took the case out of the general rule, 771

SHIP.

See Master.

1. The husband of a ship has no right to insure for any part-owner, without his particular direction; nor for all the owners without their general direction, 9

2. The name of the ship should be inserted in the policy, 80

3. Sometimes there are insurances upon "ship or ships," expected from a particular place, 82

4. A mistake in the name of the ship will not vitiate the policy if the identity be proved, 81

5. The "boat" of the ship in some voyages is usually carried on the outside, slung on the quarters, 83

6. The rigging and tackle of a ship are put on shore during a repair, by the usual course of the voyage, and burnt by accident, the underwriters are liable, 85

7. If the risk be varied by the fault of the owner or master of the "ship," the underwriters are discharged, 86

8. Whatever is usually done by every ship, in a particular voyage, is understood to be referred to by every policy, and to make a part of it as if it had been expressed, 87

9. Extraordinary wages paid to the seamen, and provisions expended during the detention of a ship, are not protected by a policy on "ship," 89

10. Neither can the assured recover for wages, provisions, or demurrage, during the ship's stay for repair, or detention of a for-

eign power, on a policy on "ship and goods," 89

11. But where provisions were sent out in a China and East Indian ship for the crew, and while the ship was lying off Bank-saul Island to be refitted, and the stores and provisions were taken, as usual in that voyage, and put into a warehouse where they were accidentally consumed by fire, it was held, that the assured could recover the loss of the provisions destroyed by a peril insured against, and not consumed by the crew, under the terms "ship and furniture," 91

12. The term "good" applied to the ship, means in the legal sense of the term, the seaworthiness, of the vessel. And it is of the first importance and of the essence of this contract, 91

13. There is an implied warranty on the part of the assured, that the ship when she sails, shall be "good," that is "seaworthy" for the voyage, 96

14. Where a ship was made seaworthy as the assured and shipbuilder thought, but having sailed in bad weather to Portsmouth from the Thames, and being very leaky, she was condemned as not fit to proceed. Held, however innocent the assured might be, the underwriters were discharged, 105

15. If a ship become leaky and unable to proceed soon after the commencement of the risk, without any visible cause, the presumption is that she was not seaworthy when she sailed, 106

16. A ship to be seaworthy, must be furnished with ground tackling sufficient to encounter the ordinary perils of the sea, 107

17. The seaworthiness of a ship is to be taken with a reference to her situation in different periods of the voyage, 108

18. There is a seaworthiness for port, and there is a seaworthiness for the voyage, 110

19. The vessel must also have a sufficient crew and captain of competent skill, 110

20. If an insured ship is to be navigated in a particular manner described by statute, if the requisitions of the statute are not strictly complied with, the insurance is void, 120

21. The implied warrantry of a ship being seaworthy for the voyage insured, is not confined to the sufficiency of the hull, but it extends to the soundness of the sails and rigging; and a ship if "warranted to sail with convoy," should be supplied with such sails as will enable her to keep up with the convoy: because a "warranty to sail with convoy," implies the necessity not only of setting sail together, but keeping up with it, in order to give the underwriters the protection to the end of the convoy's usual attendance, 122

22. By an implied warranty every ship insured must be seaworthy at the commencement of the risk, but the assured makes no warranty that she shall continue so, 123

23. Neither does the assured, after having provided a competent master, and sufficient crew for the voyage, warrant that they shall do their duty during the continuation of it, 123

24. Neither are the underwriters discharged from their liability, in the case of a loss immediately arising from one of the perils insured against, though remotely owing to the neglect and fault of the master or crew, 123, 124, 125, 126,

25. If a ship sets sail on her voyage in an apparent seaworthy condition, and afterwards, before any loss happens, she is found to be too heavily laden so as to render her unseaworthy, and the fault is remedied and she proceed on her voyage in a seaworthy condition, the underwriters are liable to a subsequent loss, 127

26. The assured cannot change the ship previous to the voyage for another, without mentioning it to the underwriters, 139

27. Whether the assured may in the course of the voyage if the original vessel is lost, tranship the goods in another vessel, 143

28. In foreign countries it is expressed either in the policies or ordinances, that "the risk of the underwriters begin the moment the goods quit the shore." But in this country the common form of the policy used is different, viz: "from the loading on board the ship," but there are exceptions to this rule, particularly with Companies of Assurance, 149

29. The risk on the body of the ship continues till the ship be moored twenty-four hours at anchor in good safety, 150

30. Where the policy is "till the ship be moored at anchor twenty-four hours in good safety," the underwriters are not liable for any loss that takes place after that time, 153

31. Where a ship arrived in port a mere wreck, and was obliged to be lashed to a hulk to prevent her sinking, held it was a total loss, 156

32. A ship being moored twenty-four hours in safety, implies the opportunity of unloading and discharging, 157

33. If an embargo is put on previous to a ship's arrival at a port, she cannot be said to be moored in safety, 157

34. Where the words "at and from" are used in the policy, the risk commences at the ship's first arrival at the port. But if there be an unreasonable delay at the port, the underwriters are discharged, 176

35. Though it be not necessary that the ship should be at the port in question at the time of making the insurance, yet there must not be an unreasonable delay in her arriving there, 177

36. When a policy is on a voyage to an island having several ports, the risk on the outward voyage ceases after the ship has been moored at the first port, 178

37. In a policy "at and from an island," the ship is protected in going from port to port, 179

38. If the policy be on "goods," and on the ship at and from a given place, beginning the adventure upon the loading thereof on board of the ship, (without saying where) it will not cover goods shipped elsewhere than the place where the risk commences, or "the ship," though they be the goods mentioned in the policy, 193

39. But if part of the cargo be landed and relanded, so as to enable the whole to be inspected: held to be a virtual reloading within the terms of the policy, 193

40. So, if a policy be declared to be in continuation of former policies, goods previously loaded will be covered by it, 194

41. Where a policy was beginning the adventure upon the goods from the loading thereof on board wheresoever, it was held to cover the loading wheresoever it took place, 194

42. But where the assured have, by the expressed terms which they have used in the policy, confined the risk to the goods "from the loading thereof" at a particular place, the Court, in construing the policy, will be guided by the express terms they have used, 195

43. Liberty for the ship to touch and stay at any ports and places whatsoever without prejudice to the insurance, is inserted in most of the policies of insurance particularly in those on voyages to distant places, such as the East and West Indies, the continents of America and Africa, and round the Capes, and to China, 208

44. An insurance upon an Indian voyage includes the "country voyage" by the usage of the trade, 214

45. If in a policy on an Indian voyage there be liberty "to touch, stay, and trade, at any ports or places whatsoever," this covers the risk of even a second country voyage, 216

46. Also where the liberty was only "to touch, and stay, at any port or place:" by the usage of the trade this covers the intermediate voyages, 217

47. But the clause giving liberty "to touch, stay, trade," &c. is to be understood with such restrictions as the Courts have thought necessary to prevent any unfair advantage of the general terms in which it is expressed. It is, therefore, always interpreted as subordinate to the voyage insured, which is the principal object of the contract; and in cases of doubt it must be understood with reference to the laws of commerce, and the usage of the particular trade, 217—226, 230

Deviation from the Voyage.

48. It is expected that a ship insured for any particular voyage does at once proceed to take and keep (if possible) the proper route and course which, according to seafaring persons, is acknowledged to be the best and the proper one to perform the voyage insured, 230

49. But if, instead of keeping the proper course, the ship, either by the direction of the assured, or his agent, or by the wilful act of the master, without necessity or any reasonable cause alter her course in a different direction, this is a "deviation" from the voyage, which voids the insurance, 230

50. So, also, if a ship is at a particular port, and is represented by the assured to the underwriters as being bound at such a time on such a voyage, upon which an insurance is made "at and from" the given port, if by sufficient proof it can be made apparent that the master by the directions of his owners, or by his own wilful act, has prepared himself to sail on a voyage different from the one proposed to the underwriters, and insured by them, and she be lost in port before she even sets sail, the insurance is vacated, from the fact of the preparations of the master to sail on a different voyage than the one insured, 231, 232, &c.

51. Where the master of a ship took her out of her course on a smuggling speculation of his own, this was held to be clearly a deviation, 231, 232

52. Where a ship puts into a port which she had no liberty by the policy to enter, held to be a deviation from the voyage, 235

53. If the master put into a port which is not usual, or stay an unusual time, it is a deviation, 235

54. Where a vessel was obliged to stay to pay sound dues, it was held that taking in provender there was not a deviation, as there was no delay of the voyage, 237

55. Taking in goods whilst lying for convoy, no deviation, no delay of the voyage being occasioned thereby, 237

56. A ship having liberty to put into one port puts into another equally in her way: this voids the policy, though neither the risk or premium would have been greater, 237, 238, &c.

57. Where several places are mentioned in a policy, the ship must go to them in the order in which they are named, 240

58. Where a deviation has once taken place, it is immaterial for how long it may continue, for the underwriter is discharged the moment it takes place, 243

59. Where a ship in the night time cruised and deviated in hopes of getting a prize: held, from that moment, the policy was discharged, 244

60. But, if a merchant ship carry letters of marque, she may chase an enemy, though she may not cruise, 244

61. Where a license is given to deviate, the Court will not extend the meaning beyond what is expressed by the parties, 247

62. The doctrine of deviation extends to policies on freight, 248
63. Where the deviation arises from necessity, the underwriter is not discharged, 248
64. Going into a port to refit is not a deviation, 250
65. Going out of the direct course to avoid a storm, or being driven out of the direct course by stress of weather, is not a deviation, 252
66. Where a plea of necessity, by the act of God, is set up, it must be made apparent that there was no default of the assured or master, 255
67. A deviation is allowable, if done to avoid an enemy, or to seek for convoy, 256
68. If a ship go to the usual place of rendezvous to join convoy, though out of the direct course, it is no deviation, 258
69. A ship may afford assistance to a ship in distress, without being guilty of a deviation, 258
70. If a ship be insured on a trading voyage, the assured must carry on that trade with usual and reasonable expedition, 259, 260
71. A deviation merely contemplated, but not carried into effect, is no deviation, 261
72. Where a ship is missing and not heard of in a reasonable time, it is by law presumed that she has foundered at sea, 351
73. In England, there is no regulation or usage of merchants fixing a time within which the assured may demand payment for a loss of a ship, in case of no account being heard of her, 353
74. *See* Ordinances of Spain and France on this Subject, 353
75. See also "The Rota of Genoa" upon this point, 362

STRANDING OF THE SHIP.

1. What shall amount to the stranding of the ship within the meaning of the memorandum, 458.
2. It is not every touching or striking on a fixed body in the sea or river, that will constitute a stranding. The ship must be stationary, 458
3. Where a ship is driven on shore and remains for any time on the ground, this is a stranding, 459
4. Where a ship under the conduct of a pilot was fastened at the pier of a dock and left and took the ground, this was held to be a stranding, 459
5. But where by the natural course of the navigation the vessel, by the flux and reflux of the tide, would be left on the ground, this is not a stranding, 460
6. Where a ship in the course of her voyage was compelled to put into a tide harbour, and was there moored, at a place usual for ships of her burthen, and it became necessary to fasten her by tackle to posts on the shore; the rope which fastened her not being of sufficient strength she fell over on her side, was stove in, and greatly injured. It was held that this was a "stranding" within the meaning of the policy, 461
7. And where a ship was in tide harbour and proceeded to discharge her cargo at a quay on the side of it, which could be done at high-water only, and not at one tide; at the first low tide the vessel grounded on the mud; but on a subsequent ebb, the rope which fastened her head stretched, and the wind blowing, she did not ground entirely on the mud, but her fore part got on a bank of stones, and the vessel having strained, some damage was sustained by the cargo, but no lasting injury was done to the ship. This was held to amount to a "stranding," 462
8. Where on a policy on "corn," the memorandum stated that the underwriter would not be liable for any average, unless general, or the ship be stranded, but their being no averment in the declaration that the ship was stranded, the assured could not recover, 475, 476
9. If the ship be stranded, that destroys the exception, and lets in the general words of the policy, 478
10. The stranding of a lighter, by which goods from the ship are carried to the shore, is not such a stranding of the ship within the terms of the exception, 480
11. The stranding must take place during the continuance of the risk, and where the goods which had, by the occurrence of certain circumstances been landed and sold, and the stranding took place afterwards, though, during the original voyage, held that this was not such a stranding as would let in the general words of the policy as to those goods, 480

USAGE.

1. An interest in expenses incurred by the captain for the use of a ship, for which he charged respondentia interest, was held to be protected by a policy on "goods, specie and effects," on the ground solely of the usage of the Indian trade, 18
2. The master's clothes or the ship's provisions, do not come under the term of "goods," nor goods lashed on deck, unless sanctioned by usage, 19
3. In some voyages there is an usage to carry the "boat" on the ship and slung on the quarters, 83
4. Usage may be admissible to explain what is doubtful—it is never admissible to contradict what is plain, 84
5. The principle upon which usage may be given in evidence as to goods lashed on "deck," is, that they are not in the place where goods are usually stowed. And the

underwriter is entitled to have notice of the fact, or of the nature of the goods, 84

6. But where there was an insurance "upon the ship and all her furniture and apparel, including the boat," and evidence was given that in voyages such as the one in question, ships invariably carried a boat in the place where the boat in question was carried, and slung as this boat was slung—parol evidence will not be admitted to prove that underwriters are not liable for the loss of a boat so slung. Inasmuch as the policy imports that the insurance is on the whole ship and all its furniture, including the boat, without any restriction, the usage is attempted to be admitted to contradict the express terms of the policy, by showing that the boat by usage, is to be excluded, 83

7. Whatever is usually done by every ship in a particular voyage, is understood to be referred to by every policy, and to make a part of it as much as if it was expressed, 87

8. The Courts of law in putting a construction upon policies, have always been guided by the custom and usage of trade, 197

9. Policies are to be construed largely for the benefit of trade, 201

10. Where goods were insured to the coast of Labrador till safely landed, are kept on board a long time after the ship's arrival—this being the usage of the trade at that place, the risk continues, 203

11. Every underwriter is presumed to be acquainted with the practice of the trade he insured, and that whether it is recently established or not, 205

12. Evidence of the practice of the trade is to be received: and the underwriter is bound to know it, 206

13. A ship may go to the general convoy at the risk of the underwriters, 198

14. A ship insured from London to the East Indies, "warranted to sail with convoy:" the warranty is to be construed according to the usage among merchants, that is, from such place as convoys are to be had, as the Downs, 198

15. An insurance on an Indian voyage includes the "country voyage" by the usage of the trade, 214

16. So, also, where the liberty was only "to touch and stay at any port or place:" by the usage of the trade this covers the intermediate voyages, 217

17. If a ship be insured on a trading voyage, the assured must carry the trade on with the usual and reasonable expedition, 259

VALUATION.

1. The effect of the valuation is only fixing conclusively the prime cost, 265

2. If it be an open policy, the prime cost must be proved. In a valued policy it is agreed to, 265

3. To argue there can be no adjustment on a valued policy, is directly contrary to the terms of the policy. It is expressly subject to average loss if the loss upon sugars exceed five per cent., 266

4. A valued policy is not to be considered as a wager policy, or like "interest or no interest," 265

5. The value should be fixed, so that the assured obtains no more than an indemnity, 265

6. If it be under-valued, the merchant himself stands insurer of the surplus, 265

7. There is no case or principle of the law of insurance, which makes the estimated value in the policy a circumstance on which the question of total or average loss ought to turn, 266

8. After judgment by default on a valued policy, the plaintiff's title to recover is confessed, and the value is fixed by agreement in the policy, 266

LAW LIBRARY
UNIVERSITY OF CALIFORNIA
LOS ANGELES

NOV 18 1952

UC SOUTHERN REGIONAL LIBRARY FACILITY
AA 000 695 410 1